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Supreme Court of The United States

OCTOBER TERM, 1969

No. 1335

EUGENE SAND & GRAVEL, INC., *Appellant*,
CITY OF EUGENE, of Lane County, Oregon, a municipal Corporation, *et al*, *Defendants*,

v.

RAYMOND N. LOWE, *et al*, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

JURISDICTIONAL STATEMENT

JOHN E. JAQUA
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INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutory Provisions involved	4
Statement of the case	4
The questions are substantial	9
Appendix "A" - Texts of Statutes	i
Appendix "B" - Copies of opinions and decree below	iii
Appendix "C" - 1934 City Memorial Park Dedication*	
Appendix "D" - Comparison of Oregon and Indiana Constitutions*	
Appendix "E" - Document Verifying Missing No-Establishment Provision*	
Proof of Service	xxxiii

*See Petition for Writ of Certiorari Appendix "C", "D" and "E"

CASES:

	Page
Doremus v. Board of Education, 342 U.S. 429	2
Everson v. Board of Education, 330 U.S. 1	3
Freidberg v. City of New York, 151 NYS 2nd 258, 260 (1956)	13
Lincoln v. Page, 241 A 2nd 799 (N.H. 1968)	14
Marcus v. Search Warrant, 367 U.S. 717	11
School Dist. of Abington Township v. Schempp, 374 U.S. 83	13

MISCELLANEOUS:

Konvitz, *Fundamental Liberties of a Free People*, chap 7, pp 42-43	13
Stern and Gressman, *Supreme Court Practice*, 4th ed, p 84	14
Story, *2 Commentaries on the Constitution of the United States*, 5th ed, pp 631-632	14

IN THE SUPREME COURT OF THE UNITED STATES
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ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OREGON

JURISDICTIONAL STATEMENT

Appellant appeals from a decree of the Supreme Court of Oregon entered on December 19, 1969, affirming the trial court's decree as per opinions of the Supreme Court of Oregon filed on October 1st, 1969, and December 19, 1969 and submit this Statement to show that the Supreme Court of the United States has juris-

diction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Oregon filed February 26, 1969, and which was subsequently withdrawn and replaced following rehearings by opinions of the same court on October 1, 1969, and December 19, 1969, appears in the appendix hereto.

JURISDICTION

The decree of the Supreme Court of Oregon was entered on December 19, 1969, in an opinion denying appellant's application for rehearing. Notice of appeal was filed in the Supreme Court of Oregon on February 26, 1969, the jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, U. S. Code, Section 1257 (2). Decisions sustain the jurisdiction of the Supreme Court of the United States to review the judgment on direct appeal in this case: *Doremus v. Board of Education*, 342 U.S. 429.

QUESTIONS PRESENTED

1. Whether a general no-Establishment of religion proviso (no preference of sect(s) and no taxing for same, the Madison-Jefferson Virginia provision) having

been omitted through clerical error from the State Constitution of Oregon in 1859, the religious rights section of the Oregon Bill of Rights—Article 1, Sections 2 and 3—is not incomplete and unconstitutional as repugnant to the guarantees of the First Amendment of the Constitution of the United States, made applicable to the states of the Fourteenth Amendment, following *Everson v. Board of Education,* 330 U.S. 1.

2. Whether it is repugnant to due process, equal protection and the privileges and immunities clauses of the Fourteenth Amendment of the Constitution of the United States for a rule of the Supreme Court of Oregon (Rule 47) to exclude a pro tem justice, who sat on the Court and wrote the majority opinion in a 4-3 ruling from participation in the rehearing process of Respondents, resulting in a reversal of the original 4-3 opinion.

3. Whether a provision of the State Constitution of Oregon, Article I, Section 5—which limits withdrawal of money from the State Treasury for the benefit of religious or theological institutions—when interpreted by the Oregon Supreme Court as limiting the use of city park property under a revocable permit for a decorative cross monument, is not contrary to the First and Fourteenth Amendments of the Constitution of the United States.

STATUTES INVOLVED

Constitution of the United States, Amendments 1, 14; Oregon State Constitution, Article I, Sections 2, 3 and 5; Oregon State Constitution, the missing general no-Establishment provision among documents of Oregon Historical Society, Portland, Oregon, a state depository, and filed as of public record in Multnomah County Court House by petitioner November 28, 1969; Supreme Court of Oregon, Rule of Court No. 47. All statutes are set out in full in Appendix "A" infra.

STATEMENT OF THE CASE

Eugene, Oregon, recently named all-American city, is Oregon's second largest municipality with a population of 75,000. A large eminence, Skinner Butte, is situated within the city limits, and rises several hundred feet above the north end of the main street and the business district. In 1915 the citizens approved a city council-initiated charter provision, permanently dedicating the Skinner Butte property to "park purposes." In 1934, by resolution, the Eugene City Council dedicated Skinner Butte as a War Memorial.

Since 1900, various symbols have been placed on the butte, including an "O" symbolizing the University of Oregon, an "E" symbolizing Eugene High School, and a succession of crosses.

In the early 1930's, a group of handicapped individ-

uals, the Lookouts, erected a wooden cross to serve as a beacon of encouragement and good will. The tradition was supported by the retail trade division of the Eugene Chamber of Commerce, which undertook to replace the old wooden crosses when they rotted out or blew over. The Chamber also lighted the cross on various holidays, including the Christmas holidays and Easter season. This series of crosses has existed, in unbroken continuity, for 35 years.

In November, 1964, John Alltucker, and some other members of the Eugene Chamber of Commerce, took steps to repair and replace the lights in the existing wooden cross on Skinner Butte. It was then determined that the cross was in such disrepair that it could not safely be used for another year. Therefore, Mr. Alltucker of Eugene Sand and Gravel, Inc. (the Petitioner herein) agreed to donate a 51-foot tapered, modernistic concrete cross (then available at its plant and which had been previously ordered by a local service fraternity of the University of Oregon for a Chamber civic project, but the order was canceled after the work was completed). Following donations from other business firms in town, the concrete cross was erected November 28, 1964, and the lighting of the cross was timed to coincide with the opening of Christmas Village, a community Christmas project located on downtown public park property cre-

ated for the enjoyment of children as part of the downtown Christmas program.

On December 2, 1964, Hamilton Electric filed with the city for an electrical permit, and the following day petitioner filed under the building code for an after-the-fact building permit. On December 4, 1964, the Eugene City Council passed a motion granting an electrical permit to Hamilton Electric and a building permit to petitioner, upon payment of a $9.00 building permit fee, and a $9.00 penalty. Under city practice private building permits are issued by the city engineer and public ones by the city council.

No taxpayers' money has ever been involved in the erection, maintenance or lighting of this cross, or any of the preceding crosses. All of the expenses have been borne by the Eugene Chamber of Commerce, or by individual businessmen or secular service groups. Further, no religious institution or organization has been involved with or in the erection, maintenance or lighting of the cross, nor was the site of the cross found to have served as a place for religious services. Petitioner has at all times paid for the lighting and maintenance of this cross.

On May 5, 1965, the Respondents, consisting of 10 adult individuals suing in their individual capacity as residents, taxpayers, and voters of the City of Eugene,

commenced this suit under the Oregon Declaratory Judgment Act in Circuit Court for Lane County, seeking a judicial determination that the erection and maintenance of the cross violated Article I, Sections 2, 3 and 5 of the Oregon Constitution, and the First and Fourteenth Amendments of the United States Constitution. Named as Defendants were the City of Eugene, the petitioner, Eugene Sand and Gravel, Inc., and various other secular individuals and corporations who assisted in erecting and providing the lighting for the cross. All parties were represented at the trial, which concluded on August 22, 1966. On January 5, 1967, the trial judge filed an opinion holding in effect, that the constitutional issues would not be decided by the Court in view of its holding that the cross constituted a purpresture violating the city charter. Thus, the Defendants were ordered to remove the cross. The case was appealed to the Supreme Court of Oregon, with some of the Defendants not participating in the appeal. A group of citizens of Eugene appeared on behalf of the cross as amicus curiae.

On February 26, 1969, the Supreme Court of Oregon, in a 4-3 decision, ruled that (1) the constitutional question could not be avoided by considering issues outside the pleadings, such as the "purpresture" issue, and (2) that the Skinner Butte cross did not violate either the Oregon Constitution or the Constitution of the United

States. Subsequently, the respondents petitioned for rehearing contending, among other things, that the Supreme Court's decision of February 26, 1969 should be discarded because a "pro tem justice" had participated in the opinion. On October 1, 1969, the Oregon Supreme Court handed down a 5-2 decision (after the pro tem justice who had participated in the previous opinion left the Court) ruling that the cross was unconstitutional. On December 19, 1969, the Oregon Supreme Court wrote a third opinion, with two justices dissenting, denying the petitioner's petition for rehearing.

This suit being tried de novo on the equity side of the Supreme Court, all trial court objections including the federal questions sought to be reviewed herein, were properly raised by Assignments of Error in petitioner's first Brief filed in the Supreme Court of Oregon. Also raised in such brief were two discoveries (made through no lack of deligence of petitioner in 1967), after filing of appeal: (1) Resolution of city council of Eugene dedicating Skinner Butte as a War Memorial Park in 1934, (2) a missing general no-Establishment provision erroneously left out of the Oregon State Constitution in 1859.

THE QUESTIONS ARE SUBSTANTIAL

1. THE GENERAL NO-ESTABLISHMENT PROVISO HAVING BEEN OMITTED THROUGH CLERICAL ERROR FROM THE STATE CONSTITUTION, SECTIONS 2 AND 3 OF THE OREGON BILL OF RIGHTS IN THE OREGON CONSTITUTION ARE INCOMPLETE AND UNCONSTITUTIONAL AS REPUGNANT TO THE FIRST AND FOURTEENTH AMENDMENTS AS CONSTRUED BY THE OREGON SUPREME COURT.

Appendix "E", infra, clearly spells out that the no-Establishment provision intended to be included in 1859 was omitted through an error of the clerk-scrivener of the Constitutional Convention. This material was not discovered until after the appeal to the Supreme Court of Oregon was filed. The information relative thereto appeared in Appellant's main brief filed December 7, 1967.

The first opinion of the Supreme Court of Oregon apparently did not make it necessary to discuss this matter, since the Court ruled that the Cross did not contravene the State and Federal constitutions. But, on October 1, 1969, when the Court withdrew its original opinion of February 26, 1969, the matter then became relevant and on November 28, counsel for Appellant filed detailed motions to apply on a trial de novo, the historical

material pertinent to the missing Establishment provision. See Record —163 et seq.

In its December 19, 1969 opinion, the Court speaks in terms of "not word matching" the Indiana constitution. This is not a matter of "word matching", it is a matter of recognizing on a trial de novo a now relevant and important missing constitutional provision. The refusal of the Oregon Court to pass on the motions resulted in the Court deliberately ignoring facts which were crucial to the case and should have been received into evidence as such facts had then been made relevant by the Court's opinion. The records of the Constitutional Revision Commission of the State of Oregon, appointed by the Oregon State Legislature, show that Justices O'Connell and Goodwin of the Supreme Court of Oregon participated in drafting a new constitution for the State of Oregon and (together with counsel Hans Linde for the Appellees) were no doubt quite aware of the missing Establishment provision at the time of the October 1 and December 19, 1969 opinions. The new constitution, which is to be submitted to the vote of the people on May 26, 1970, was a result in part of their efforts. The proposed new constitution to be submitted to the people of Oregon *still* omits the no-Establishment provision which is missing in the existing constitution.

2. RULE 47 OF THE OREGON SUPREME COURT, AS APPLIED TO APPELLANT, CONTRAVENES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This matter is fully treated in Appellant's Petition for Writ of Certiorari, pages 17-20, which is incorporated by reference into the Jurisdictional Statement. A rule of court is within the word "statute." See *Marcus v. Search Warrant*, 367 US 717, discussed in Stern and Gressman, *Supreme Court Practice*, 4th ed., p. 84.

3. WHETHER A PROVISION OF THE STATE CONSTITUTION OF OREGON ARTICLE I, SECTION 5, PROHIBITING WITHDRAWAL OF MONEY FROM THE STATE TREASURY FOR THE BENEFIT OF "RELIGIOUS OR THEOLOGICAL INSTITUTIONS" WHICH IS INTERPRETED BY THE OREGON SUPREME COURT AS ALSO LIMITING THE USE OF CITY PROPERTY UNDER A REVOCABLE PERMIT FOR A DECORATIVE CROSS MONUMENT IS CONTRARY TO THE CONSTITUTION OF THE UNITED STATES.

In equating money from the *State* Treasury with *use* of municipal park land, the Oregon Supreme Court, in its December 19, 1969, opinion went squarely into the face of the plain wording of the Oregon Constitution. If

there is one rule which is paramount in constitutional construction it is the document is to be interpreted on its plain and unambiguous words and meaning. This Oregon Constitutional provision in question contains a *special* limitation on use of state funds for the benefit of "religious or theological institutions" which, according to the doctrine of contemporaneous construction, referred to private sectarian schools and seminaries of a theological nature. The State historical depositories support this.

There is historical evidence in the record, plain and uncontroverted, that the Oregon Supreme Court's construction is not only totally unhistoric and unwarranted but contrary to Article VI of the Constitution of the United States.

The use by the Oregon Supreme Court of Article I, Section 5 of the Oregon Constitution as the basis for its decision on a "state issue", is improper when used as a device to prevent review on a federal question, involving valuable rights protected by the First Amendment to the Constitution of the United States.

As the Oregon Supreme Court has interpreted Article 1, Section 5, it infringes upon Appellant's rights under the First and Fourteenth amendments of the Constitution of the United States in preventing it from the full and proper exercise of its rights of free expression.

THE MERITS OF THE FIRST OPINION

FEBRUARY 26, 1969

The December 19, 1969 decision stands *alone* against a host of impressive state and federal authorities. The solidarity of judicial precedent is a strong tribute to the great qualities communities live by and aspire to. Monuments, memorials and ceremonials make us richer in spirit and living and belong to that great collection of Americana so fittingly called "The American Bible" by Carl Sandberg. The case at bar fits squarely within the Federal *Schempp* test.

Decoration is neither devotion, endorsement, nor indoctrination. Monuments, memorials and ceremonials stoutly woven into the fabric of our civil polity. See Konvitz, *Fundamental Liberties of a Free People*, chap 7, pp 42-43 (Cornell P. Press, 1957):

> "The Constitution, Justice Reed has said, should not be stretched to forbid 'national customs' or 'accepted habits of our people.' "

Local matters should be settled at local levels and with the utilization of judicial restraint. *Freidberg v. City of New York*, 151 NYS 2nd 258, 260 (1956). There is no limitation on exercise or compulsion nor is it at a place of or used for religious worship or observances.

This secular cross is not like the Wailing Wall in Jerusalem used for exercise purposes. There is no public

purse involved, no Establishment, and no possible religious persecution. See Story, *2 Commentaries on the Constitution of the United States,* 5th ed, pp 631-632 (Little Brown & Co., 1891). This is entirely unlike foreign aid from the public purse to any nation having a religious affiliation, such as the shipment of arms to Israel. Establishment?

In an astronaut and ecumenical age, this secular cross is not sensitive. (Thus, the Prayer Room at the National Capitol). It is a unifying force, and "divisive" only in the minds of a dissent few.

The Northwest Ordinance, to which the Oregon Territory subscribed, provided that "perfect toleration of religious sentiment—shall be secured." Tolerance breeds tolerance. Today, Presidents of the United States hold White House religious services and Prayer Breakfasts; we have "Merry Christmas" to *all*. The *first* formal religious service in the Prayer Room was Jewish and led by Senator Javits. See *Liberty* magazine, Jan-Feb 1966 issue, p 2. We should encourage tolerance and unity, rather than set the clock back to fighting days.

The recent New England town meeting prayer case of *Lincoln v. Page*, 241 A 2nd 799 (N.H. 1968) lends muscle to the custom of the crosses in the case at bar. In *Lincoln* the 200-year custom of non-public officer controlled invocations—at town meetings was challenged

and held not a violation of the First Amendment. Said Mr. Chief Justice Kenison, quoting Mr. Justice Holmes:

> " 'If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it * * * .' "

Appellant respectfully requests that the Court permit it to amend or supplement its Jurisdictional Statement in the event that Appellant determines the need therefor. Previously Appellant had filed herein an application for extension of time within which to file the Jurisdictional Statement, but Appellant did not receive advice from the Court whether its application for extension had been granted or denied as of the close of business in Washington, D. C. March 18, 1970, and this Jurisdictional Statement is the product of all-out unanticipated last moment staff effort.

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March 18, 1970

APPENDIX "A"

Constitution of the United States

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Oregon State Constitution

ARTICLE I

Section 2. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.—

Section 3. No law shall in any case whatever control the free exercise, and enjoyment of religeous (sic) opinions, or interfere with the rights of conscience.—

Section 5. No money shall be drawn from the Treasury for the bnefit of any religeous (sic), or theological institution, nor shall any money be appropriated for the payment of any religeous (sic) services in either house of the Legislative Assembly.—

Supreme Court of Oregon

Rules of Procedure

Rule 47

PETITIONS FOR REHEARING

Section 1

A petition for rehearing, including a supporting brief, if any, may be either typewritten or printed, but in either event, shall be prepared in conformity with the requirements of Rule 11. In addition to such requirements the author of the opinion and the justices who participated in the decision of the case shall be designated on the cover. The petition shall be signed by counsel and shall set forth without argument wherein it is claimed the court has erred. The petition, with accompanying brief, if any, shall be filed within 20 days from the date of the filing of the court's opinion, or, if no opinion is filed, from the entry of judgment or decree in the case. In the event the petition and briefs are typewritten, the original and ten legible copies, and, if printed, the original and 25 copies shall be filed. No oral argument will be heard on petition for rehearing. The adverse party need not answer such petition unless requested by the court.

Section 2

In the consideration and determination of petitions for rehearing all the justices may participate whether or not they participated in the original decision.

The missing no-Establishment Provision

(From Indiana State Constitution, Article I Section 4)

"Creedal preference. No preference shall be given, by law, to any creed, religious society, or mode of worship; and no man shall be compelled to attend erect, or support any place of worship, or to maintain any ministry, against his consent."

APPENDIX "B"

OPINIONS OF THE SUPREME COURT OF OREGON

OPINION NO. 1

No. 9101—February 26, 1969

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC

LOWE ET AL, *Respondents*, *v.* CITY OF EUGENE ET AL, *Defendants*, EUGENE SAND & GRAVEL, INC., *Appellant*.

Appeal from Circuit Court, Lane County.

WILLIAM S. FORT, Judge.

Argued and submitted January 6, 1969.

William G. Wheatley, Eugene, argued the cause for appellant. With him on the briefs were William E. Flinn, and Jaqua, Wheatley & Gardner, Eugene, and Warren Cameron, Special Counsel, Seattle, Washington.

James P. Harrang, Eugene, and *Leo Pfeffer*, New York, New York, argued the cause for respondents. With them on the brief was Barbara B. Aldave, Eugene.

Howard M. Feuerstein, Portland, filed a brief for American Civil Liberties Union of Oregon as amicus curiae.

Richard D. Curtis, and Hansen & Curtis, Eugene, filed a brief for Leslie D. Erb et al, as citizens of the City of Eugene as amici curiae.

Before PERRY, Chief Justice, and MCALLISTER, SLOAN, O'CONNELL, GOODWIN, DENECKE and LANGTRY, Justices.

REVERSED AND REMANDED.

LANGTRY, J. (Pro Tempore).

The crest of Skinner's Butte overlooks the City of Eugene and is within the city limits. It was donated to the city and for many years it has been maintained as a public park. From the late 1930's until 1964 successive wooden crosses were erected in this park, one replacing another as they deteriorated. These crosses were usually lighted at the Christmas and Easter seasons. One of the early crosses was large and neon-lighted. Construction of the first cross was motivated, at least in part, by a secular organization of physically handicapped people who received pleasure from looking out at the lighted cross. On November 28, 1964, defendant Eugene Sand & Gravel, Inc., with the aid of defendants Hamilton Electric and J. F. Oldham & Son, Inc., erected a prestressed concrete tapered Latin cross 51 feet tall on the property. The cross was equipped with inset neon tubing to provide lighting for the cross at the Christmas and Easter seasons. The plaintiffs in this declaratory judgment suit seek removal of this cross upon constitutional grounds.

It appears that no permission had been obtained from the city for erection of the earlier crosses. The city did not, however, interfere with any of the crosses —all were erected and maintained by the Eugene Chamber of Commerce and various individuals and other organizations at no expense to the city. No permission was obtained from the city to erect the challenged cement cross. But on December 2, 1964, after the cross had been put up, a building permit and an electrical permit were applied for by Eugene Sand & Gravel and Hamilton Electric. On its application Eugene Sand & Gravel gave as its reason for erecting the cross the word "admiration." The appli-

cations were referred to the city council for approval and they became the subject of a highly publicized public hearing which was attended by an overflow crowd. At the conclusion of the hearing the council, by a 7 to 1 vote, issued the permits. The plaintiffs, who are voters and taxpayers of the city and members of various religious and nonreligious organizations, brought this declaratory judgment suit alleging violation of Art. I, §§ 2, 3, and 5 of the Oregon Constitution, and the First and Fourteenth Amendments to the U. S. Constitution. The city and the builders of the cross were named as defendants.

The defendant Eugene Sand & Gravel, Inc., in one of several affirmative answers, all of which were stricken by the court on plaintiffs' motion, asserted that the city has authority under its charter and the laws of Oregon to allow the erection and maintenance of the cross as a monument upon city park property. This defendant's amended answer, and answers by other defendants, joined issues solely upon the constitutional questions involved.

After an extensive trial, reported in an 883-page transcript, and thorough briefing of the case, the trial court handed down its written opinion in which it held that the cross is primarily a religious symbol and "only secondarily a memorial of or a monument to a vitally significant value system in the life and history of our nation and this community;" that the charter of the city and the laws of Oregon do not specifically allow any private person to erect or maintain in the city park a permanent religious symbol; and that the city council or any private person has no authority to maintain the cross. These findings were in the formal findings of fact.

The court also found that the City of Eugene "did

not authorize or consent to the erection of the cross." The court held as a legal conclusion that it could decide the case without reaching the constitutional questions. The basis of this conclusion was that the city had no specific authority under charter or statute to allow the cross in the park. The decree required removal of the cross.

The City of Eugene did not appeal from this decree, but Eugene Sand & Gravel, Inc., did appeal and relief has been stayed pending determination.

Eleven amici curiae, who are residents, voters, and taxpayers of the City of Eugene, joined the controversy when the city failed to appeal from the trial court decree. They have asserted that they represent the citizens of Eugene and they have filed a brief seeking reversal of the decree. The American Civil Liberties Union has filed a brief amicus curiae in support of plaintiffs' position.

We think the trial court erred in holding that the constitutional questions could be avoided. The rationale of the trial court was that the city, either in its charter or state laws, had no specific authority to allow erection of a religious symbol in a city park. It is correct that if a constitutional question can be avoided by deciding a case on a non-constitutional issue courts will do so. *Elliott v. Oliver*, 22 Or 44, 29 P 1 (1892). But this rule is limited to a situation where the record in the case presents some other and clear ground upon which the court may rest its judgment. 22 Or at 48. In the case at bar, the issue of city authority which defendants sought to raise in an affirmative answer was stricken by the court on plaintiffs' motion. The issues were then drawn solely on constitutional grounds in amended pleadings, and

the record did not present the issue of the city authority. The constitutional questions must be decided.

These questions have been briefed and argued in depth by the contending parties and amici curiae in this appeal. The briefs present more than 650 citations of authority, texts, and statutes.

Two of the many precedents cited by counsel come close to being in point to the factual situation and law upon which this case must be decided. These are *State v. Morrison*, 57 So2d 238 (La 1952), cert. den., April 28, 1952; and *Paul v. Dade County*, 202 So2d 833 (Fla Ct App 1967), cert. den., Florida Supreme Court, 207 So2d 690, cert den., U. S. Supreme Court, 390 US 1041 (no opinion, Mr. Justice Douglas dissenting).

In *Morrison* a Catholic religious order presented to the City of New Orleans a statue of Mother Cabrini on which the following inscription appeared:

> "'"St. Frances Xavier
> Mother Cabrini
> Erected August 25, 1949
> By The Order Of The Alhambra
> During Its 23rd Biennial Convention."'"

This statue was placed upon public park property at no cost to the city and the city's authority to allow its placement there was challenged in a suit by a lay member of a Protestant religious sect. The statue of Mother Cabrini showed her in religious habit, wearing a cross. She had done part of her charitable and church work in New Orleans. The Louisiana appellate court held:

> "It cannot be questioned that a municipality may permit the erection of statues and memorials in public places, whether they be purely orna-

mental or include the idea of a memorial * * *." 57 So2d at 247.

The appellate court in its opinion approved the trial court's finding that there was no federal constitutional question involved * * * since the erection of the statue here complained of cannot be held to be the establishment of a religion * * *." Reference was made to the pertinent provisions of the Louisiana Constitution which are quite similar to those respecting freedom and establishment of religion in the Oregon Constitution. The court took judicial notice of the existence of the many kinds of statues and monuments on public property in Louisiana and across the country which are religious in character, and then held:

> "The only restriction against the City is that it cannot discriminate. That any statue or monument might incidentally have some religious significance cannot be held violative of the constitutional prohibitions, unless it was designed and used as a public shrine or place of worship, or for the propagation of a religious belief; or was intended to hold some other religious group in public con-

[1] As early as 1874, the then Supreme Court of New York held that:

> "Statues, of men, and in commemoration, of great public events, are now considered as the legitimate belongings of public places * * *. Cities * * * give abundant proof that statues, ornamental temples, obelisks, pillars and columns, have long been considered legitimate objects of public approval and admiration, and they are neither to be hid in a corner, nor placed where they cannot be seen." Tompkins v. Hodgson, 2 Hun 146 (NY 1874).

To the same effect see Parsons v. Van Wyck, 56 App Div 329, 67 NYS 1054 (1900); Vale v. City of San Bernardino, 109 Cal App 102, 292 P 689 (1930); Brahan v. City of Meridian, 111 Miss 30, 71 So 170 (1916).

> * * * [T]he use of park lands for buildings or purposes which are incidental to its use as a public park are generally sustained, where the city retains control of the premises * * *." Rhyne, Municipal Law 473, § 21-7.

tempt and ridicule; or designed to cause religious strife and antagonisms.'" 57 So2d at 246.

The appeal in the second case, *Paul v. Dade County*, supra, which we consider to be more closely in point, was decided after the trial court in the case at bar made its decision and thus the trial judge did not have the benefit of its reasoning.[1]

The report of that case states that from 1955 to 1966 the Chamber of Commerce had erected a large cross consisting of lights on the side of the Dade County courthouse during the Christmas season. The county bore no part of the cost.

The practice of permitting the cross to be there was challenged by a non-Christian resident taxpayer.[2]

[1] The opinion of the trial court was rendered in this case on January 5, 1967. Paul v. Dade County, supra, was decided by the Florida Appellate Court on October 3, 1967, and certiorari was denied by the United States Supreme Court, 390 US 1041, on April 29, 1968. Appellant's brief indicates the pleadings of Paul v. Dade County and the trial court's decree therein were brought to the attention of the trial judge in the case at bar.

[2] The challenge was based upon the First Amendment to the United States Constitution, and upon Sections 5 and 6 of the Bill of Rights of the Florida Constitution. The latter sections are:

"Section 5. The free exercise and enjoyment of religious profession and worship shall for ever be allowed in this State * * * but the liberty of conscience hereby secured shall not be so construed [sic] as to justify licentiousness or practices subversive of, or inconsistent with, the peace or moral safety of the State or society.

"Sec. 6. No preference shall be given by law to any church, sect or mode of worship and no money shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution."

The section of the Louisiana Constitution construed in State v. Morrison, supra, is:

"Section 4. Every person has the natural right to worship God according to the dictates of his own conscience. No law shall be passed respecting an establishment of religion, nor prohibiting the free exercise thereof, nor shall any preference

Continued on page 1066

The county admitted that it allowed the "Latin" cross upon the building and that such a Latin cross could be used as a religious symbol. But it asserted that crosses also have secular connotations and that the Latin cross on the courthouse had a secular connotation as a "yule" season decoration.

The defendants in the case at bar have made contentions similar to those made by Dade County. In this regard we noted above that the trial court in the case at bar found the cross to be "primarily a religious symbol," and "secondarily a memorial of or monument to a vitally significant value system in the life and history of our nation and this community." With these findings we do not disagree.

In *Paul v. Dade County*, the court held:

> "The applicable constitutional criterion, as we divine it, is that set forth by the United States Supreme Court in Abington Tp. School District v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963):
>
> "'* * *. The test may be stated as follows: what are the purpose and the primary effect of the

(Continued from page 1065)

ever be given to, nor any discrimination made against, any church, sect or creed of religion, or any form of religious faith or worship." LSA Constitution, Art. I, § 4.

The sections of Article I of the Oregon Constitution plaintiffs claim to be violated are:

"Section 2. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.

"Section 3. No law shall in any case whatever control the free exercise, and enjoyment of religeous (sic) opinions, or interfere with the rights of conscience.

"Section 5. No money shall be drawn from the Treasury for the benefit of any religeous (sic), or theological institution, nor shall any money be appropriated for the payment of any religeous (sic) services in either house of the Legislative Assembly."

enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. Everson v. Board of Education, [330 U.S. 1, 67 S. Ct. 504, 91 L.Ed. 711, 168 A.L.R. 1392, supra;] McGowan v. Maryland, supra, 366 U.S. [420] at 442, 81 S. Ct. [1101] at 1113-1114, 6 L.Ed.2d 393.' Id. at 374 U.S. 222, 83 S.Ct. 1571.

"It has also been observed that many symbols, though religious in origin, have ceased to have religious meanings *or have also acquired secular meanings.*' See Abington Tp. School District v. Schempp, supra. For example, the dove, the star, the fish, and three interwined [sic] rings have all had, or presently may have, some religious symbolism attached thereto. On the other hand, some have also acquired certain secular meanings.

"The record does not indicate that this temporary string of lights forming a cross was used to support, aid, maintain or establish any religion or religious edifices. Its purpose was not to promote the participation by anyone in the affairs of any religious organizations or sect.

"Consequently, we hold that under the Schempp test, this does not amount to the establishment of a religion in violation of the First Amendment, and that it does not amount to a religious activity, controlled, supported or influenced by the government as was found to exist in Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962). See also: State ex rel. Singelmann v. Morrison, 1952 La.App., 57 So.2d 258." (Emphasis supplied.) 249 So.2d at 835.

The Florida court referred to the lights as temporary in character; the cross in the case at bar is per-

manent in physical character. Obviously, however, a physically permanent structure such as this cross can be quickly removed. The *Dade County* cross was put up from 1955 to 1966, a total of twelve years. It was assuming the proportions of tradition, which suggests permanency. In this respect, the cross in the case at bar and the cross on the Dade County courthouse share the same characteristic.

The trial court in the case at bar failed, apparently by oversight, to receive in evidence all of defendants' offered Exhibits 2 through 53. These exhibits, which we hold should have been received, are in the record and we are considering them. They indicate that many crosses and other religious symbols traditionally have been used as monuments and memorials upon public property throughout Oregon and the United States, without appellate court challenge except as noted in this opinion. This, in itself, is indicative of a feeling among a people who strongly support a constitutional government, that there is no constitutional question involved in such a case, or it is so minimal as not to merit notice. The evidence indicates that to many people the cross, whether it is a Latin cross or some other type, carries connotations that are not essentially religious in character and to such people it has primarily secular meanings. There is nothing in the evidence which reasonably supports an inference that the purpose of the defendants in erecting the cross was to promote the participation by anyone in, or the advancement or inhibition of, any religious belief or organization, or that such was its primary effect. In *Dickman et al v. School Dist. 62C et al*, 232 Or 238, 247, 366 P2d 533 (1961), cert. den. 371 US 823, 83 S

Ct 41, 9 L ed 2d 62 (1962), Mr. Justice O'Connell, speaking for this court, said:

> "* * * A certain amount of interplay of influences exercised by state and church has been permitted. It is not difficult to cite examples. * * * [M]any * * * religious practices and connotations are found in the functioning of government, both state and federal."

We do not believe that the erection and maintenance of the cross in question amounts to a religious activity which violates the applicable provisions of the Oregon Constitution or the First and Fourteenth Amendments to the United States Constitution.

The official action of the City of Eugene in issuing the building and lighting permits for the cross a few days after it was erected, and after a widely publicized and well attended public hearing, constituted formal permission of the city for it to remain there at no cost to the city. Such a permit appears to be limited in that it is revocable in nature. 10 McQuillin, Municipal Corporations 183, § 28.53 (1966).

The conclusions of this opinion follow a study of the extensive evidence, assignments of error, answers, and arguments. Although not all of them have been mentioned in this opinion they have not been overlooked. The decree of the trial court is reversed and the case remanded for a decree to be entered consistent with this opinion.

DENECKE, J., specially concurring.

I concur in the majority decision that the constitutional issue must be decided and I further concur in the majority decision that neither the Constitution of Oregon nor the Constitution of the United States requires that the cross be removed. I believe I base

my decision upon slightly different reasoning than that used by the majority.

I consider the problem as one arising under the "establishment clause" of the First Amendment, rather than under the "free exercise" clause. Therefore, I would pose the issue: Does the city foster the establishment of the Christian religion by permitting private persons to erect a cross in a city park and to light the cross during the Christmas and Easter season? In my opinion it does not.

In *Niemotko v. Maryland*, 340 US 268, 71 S Ct 325, 95 L Ed 267 (1951), the city Park Commissioner refused to give a Jehovah's Witnesses group a permit to hold Bible talks in a city park. The group held such a meeting without a permit and Niemotko, a member of the group, was arrested and later found guilty of disorderly conduct. The Court reviewed its early decisions and stated:

> "* * * In those cases this Court condemned statutes and ordinances which required that permits be obtained from local officials as a prerequisite to the use of public places, on the grounds that a license requirement constituted a prior restraint on freedom of speech, press and religion, and, in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, must be invalid. * * *" 340 US at 271.

The Court found that the city had not given Niemotko a permit because the City Council disliked or disagreed with the Witnesses' views. The conviction was reversed. The Court expressly rejected the argument, "that state and city officials should have the power to exclude religious groups, as such, from the use of the public parks." 340 US at 272.

Fowler v. Rhode Island, 345 US 67, 73 S Ct 526, 97 L Ed 828 (1953), similarly held Jehovah's Witnesses had a right to hold religious services in a city park where other religions were permitted to hold services. The holding rested upon the First and Fourteenth Amendments.

Both of these decisions concern the free exercise portion of the First Amendment; however, they accept without question the proposition that a city does not violate the establishment clause of the First Amendment by permitting religious groups to hold religious services in public parks. If a city can validly permit groups to hold religious services in parks, why can it not validly permit persons to erect a religious symbol, a cross, in a park?

The Establishment Clause prohibits the state, or any subdivision, from either aiding or appearing to aid the general cause of religion or any one religion. The appearance of fostering religion is to be prohibited as much as the actual fostering of religion: Both have a coercive effect.

Accepting the proposition that permitting religious services in a public park neither fosters nor appears to foster the establishment of religion, in my opinion issuing a revocable permit for the erection and the occasional lighting of a cross in a public park also does not foster or appear to foster the establishment of religion.

Whether the state action or permission appears to foster a religion is a question of degree. If the city had given a religious group a revocable permit to build a cathedral in the park, the appearance of city aid to religion would, in my opinion, be so strong as to require a decision that such permission was in aid of the establishment of religion and that, therefore, it was

invalid. I do not believe permission to erect the Eugene cross falls into this category.

GOODWIN, J., dissenting.

As I understand the majority, the maintenance of the cross in a Eugene city park (a) is not a religious activity, or (b), if it is a religious activity, the city's participation in it is so insubstantial as to fall within the rule that the law does not notice trifles.

Much as I would like to join the majority and thus avoid an expression of disunity concerning this locally acrimonious confrontation between "procross" and "anticross" factions, the record compels me toward a different conclusion.

The display of the lighted cross during Christian festivals is at least concurrently a religious activity, even if one were to accept the somewhat labored argument of the proponents of the cross that the true motive for the display has been secular, i.e., the commercial exploitation of religious holidays. Indeed, the "procross" faction in this litigation has been embarrassed by its friends. Several witnesses innocently jeopardized the defense by references at the city council hearing to their religious reasons for wanting to keep the cross on display as a silent witness to their faith. Their statements reflected the popular sentiment at the time and place, and furnished ample proof, if any were needed, that the chief purpose of the display was religious. There is no doubt, from the record, that the mayor and council were responding to popular demand. It was to prevent this very kind of response to majority pressure, however, that the establishment clause of the First Amendment was written into our federal constitution. *Abington School Dist. v.*

Schempp, 374 US 203, 83 S Ct 1560, 10 L Ed 2d 844 (1963).

Turning to our state constitution, and given the majority's acknowledgment that the cross display is that of a religious symbol, there is further reason to rebuke the city council. Government has no more right to place a public park at the disposal of the majority for a popular religious display than it would have, in response to a referendum vote, to put the lighted cross on the city hall steeple. The whole point of separation of church and state in a pluralistic society is to keep the majority from using its coercive power to obtain governmental aid for or against sectarian religious observances. See *Dickman et al v. School Dist. 62C et al*, 232 Or 238, 246-247, 366 P2d 533 (1961), cert. denied, 371 US 823 (1962).

Finally, I do not believe the difficult constitutional question is one that can be evaded by trivialization. The cross does not occupy a large tract of land, but it is permanent and it is conspicuous. Whether so intended by the city council or not, the city's participation in the display has placed the city officially and visibly on record in support of those who sought government sponsorship for their religious display.

For the foregoing reasons, I would affirm the judgment entered below.

McAllister and O'Connell, JJ., join in this dissenting opinion.

OPINION NO. 2

No. 9267—October 1, 1969

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC

LOWE ET AL, *Respondents*, *v.* CITY OF EUGENE ET AL, *Defendants*, EUGENE SAND & GRAVEL, INC., *Appellant*.

Appeal from Circuit Court, Lane County.

WILLIAM S. FORT, Judge.

Argued on rehearing June 2, 1969. Former opinion filed February 26, 1969. 87 Or Adv Sh 1059, 451 P2d 117.

John E. Jaqua and *William G. Wheatley*, Eugene, argued the cause for appellant on rehearing. On the brief opposing rehearing was William G. Wheatley, Eugene.

Barbara B. Aldave, Eugene, and *Leo Pfeffer*, New York, New York, argued the cause for respondents on rehearing. With them on the petition for rehearing and brief was James B. Harrang, Eugene.

Warren Cameron, Seattle, Wash., and Richard D. Curtis and Hansen, Curtis & Strickland, Eugene, filed a brief for Leslie D. Erb et al, citizens of the City of Eugene, as amici curiae.

Before PERRY, Chief Justice, and MCALLISTER, SLOAN, O'CONNELL, GOODWIN, DENECKE and HOLMAN, Justices.

FORMER OPINION WITHDRAWN; DECREE AFFIRMED.

GOODWIN, J.

The trial court, in a suit for declaratory relief,

ordered the City of Eugene and the other named defendants to remove from a public hilltop park a neon-lighted concrete cross some 50 feet tall which, when lit, was visible for several miles over a major part of the city of Eugene. On appeal, this court reversed the trial court's decree. The matter is before us again, on a petition for rehearing.

In a brief and upon oral argument, counsel challenged the propriety both of the granting of the rehearing and of the submission of the cause to a court that contained a justice who had not participated in the original decision.

On January 6, 1969, the original appeal was argued before a court consisting of Chief Justice PERRY and Justices MCALLISTER, SLOAN, O'CONNELL, GOODWIN, DENECKE and LANGTRY. In the absence of Justice HOLMAN, a regular member of the court, Justice LANGTRY was sitting as a Justice pro tempore duly assigned to this court pursuant to ORS 2.052.

The court handed down its original opinion on February 26, 1969, reversing the trial court. Justices PERRY, SLOAN, DENECKE and LANGTRY voted for reversal. Justices MCALLISTER, O'CONNELL and GOODWIN dissented. *Lowe v. City of Eugene*, 87 Or Adv Sh 1059, — Or —, 451 P2d 117 (1969).

The plaintiffs filed a petition for rehearing. On April 22, 1969, the court in its regular weekly conference considered the petition. Four of the regular justices who had participated in the original decision favored granting the petition. The other two regular justices and Justice LANGTRY opposed granting the petition. Since four of the regular justices who had participated in the original decision voted for a re-

hearing, it was unnecessary to decide whether Justice HOLMAN or Justice LANGTRY or neither of them or both of them should vote on the petition. The petition was granted.

The rehearing was set for June 2, 1969. On that date the cause was argued before the seven regular justices of the Supreme Court, none then being absent or disqualified. The court was thus convened according to the practice followed when a case is reargued in banc and no regular justice is disqualified. Justice LANGTRY had been appointed to serve for ninety days beginning the first judicial day in January, and his term had expired before June 2, 1969. The submission of the cause on rehearing to the seven regular justices, including Justice HOLMAN, was correct.

The question whether a justice who did not participate in an original decision is barred from subsequent consideration of that case is potentially troublesome in any jurisdiction which allows rehearings. There are numerous reasons other than that of disqualification for a particular justice to be absent from a particular argument. Moreover, if the reason for the original absence was temporary, it is likely that the absent justice will be available for duty when the case is argued on rehearing.

Two lines of precedent in the United States deal with this situation.

In some jurisdictions a regularly elected justice who, for any reason, does not participate in an original decision does not participate in any subsequent considerations of that case. The reasons for the rule are set out in *Gas Products Co. v. Rankin*, 63 Mont

372, 207 P 993, 24 ALR 294 (1922); *Flaska v. State*, 51 NM 13, 177 P2d 174 (1946); *Cordner v. Cordner*, 91 Utah 474, 64 P2d 828 (1937); *Rohlfing v. Moses Akiona, Ltd.*, 45 Hawaii 440, 369 P2d 114 (1963); but cf. *Yoshizaki v. Hilo Hospital*, 50 Hawaii 40, 429 P2d 829 (1967).

In California, the court as it is constituted on the day a case is argued on rehearing is the Supreme Court for the purpose of the vote on the questions argued. 'A regularly elected justice who is present for duty and not disqualified hears argument and participates in the vote. *See Metropolitan Water Dist. v. Adams*, 19 Cal 2d 463, 122 P2d 257 (1942). Accord, *Glasser v. Essaness Theatres Corp.*, 346 Ill App 72, 89-100, 104 NE2d 510 (1952); *Battle v. Mason*, 293 P2d 324, 333-334 (Okla 1955).

We believe that the better reasoned cases are those which follow the California rule.

The institution of rehearing was invented and has survived because it is beneficial to the administration of justice. This court permits any party to file a petition for rehearing within 20 days following the publication of our opinion announcing a decision. Oregon Supreme Court Rule 47.

Every petition is carefully considered by the court. On any given date the court may be made up of seven justices who may not be the same seven who constituted the court the day, the week, or the month before. This change in the court's composition may be the result of many factors: e.g., illness, retirement, election. The court nonetheless votes and makes decisions as a court, not as a collection of individual justices.

Both initially and upon rehearing, the parties have

the right to a decision by a lawfully constituted court. They do not have a right to a decision by a particular judge or group of judges. In the case at bar, no decree has yet been placed beyond the power of this court to recall, modify or reverse; the cause is still pending. Until the time for rehearing has expired, the party in whose favor a decision is rendered has no vested right in the decision that would preclude its re-examination and vacation in the ordinary course of judicial administration. *Metropolitan Water Dist. v. Adams*, 19 Cal 2d at 475.

When the court, on June 2, 1969, heard argument on rehearing, Justice HOLMAN was present for duty, was not disqualified, and had both the right and the duty to vote on the merits of the case.

We hold, therefore: (1) that regardless of the number of justices available and qualified to vote, the petition for rehearing in this case was properly granted by a majority vote of a lawfully constituted court; (2) when the case came on in due course for argument on rehearing it was heard before a lawfully constituted court.

The majority of the court before which the case was argued on June 2, 1969, is of the opinion that the decree of the trial court should be affirmed for the reasons substantially as set forth in the dissenting opinion handed down on February 26, 1969. The former majority opinion handed down on February 26, 1969, is accordingly withdrawn. The decree entered below is affirmed. Neither party shall have costs in this court.

DENECKE, J., dissenting.

I concur in that part of the majority opinion ap-

proving the granting of the petition for rehearing and the procedure on rehearing. Upon the constitutional issue, however, I dissent for the reasons stated in my specially concurring opinion filed with our former decision.

PERRY, C. J., joins in this dissent.

OPINION NO. 3

No. 9313—December 19, 1969

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC

LOWE ET AL, *Respondents*, *v.* CITY OF EUGENE ET AL, *Defendants*, EUGENE SAND & GRAVEL, INC., *Appellant*.

Appeal from Circuit Court, Lane County.

WILLIAM S. FORT, Judge.

On appellant's petition for rehearing filed November 28, 1969. Former opinions filed February 26, 1969, 87 Or Adv Sh 1059, 451 P2d 117, and October 1, 1969, 89 Or Adv Sh 323, 459 P2d 222.

William G. Wheatley, and Jaqua, Wheatley & Gardner, Eugene, and Warren Cameron, Olympia, Washington, for the petition.

REHEARING DENIED.

GOODWIN, J.

In an action for a declaratory judgment determining the constitutionality of the issuance by the City of Eugene of building permits for the erection of a cross on city-park property, the circuit court for Lane County entered a decree requiring removal of the cross. An appeal to this court was argued January 6, 1969; on February 26, 1969, this court reversed and remanded, with three judges dissenting. A petition for rehearing, filed April 22, 1969, was allowed, and the cause was argued on rehearing June 2, 1969. On October 1, 1969, this court, with two judges dissenting, withdrew its earlier majority opinion and affirmed

the trial court by adopting in substance the previous dissent as the opinion of the court.

In a new petition for rehearing, the parties who prevailed in the original opinion have listed a number of objections to the decision on rehearing. In granting the first rehearing and withdrawing the majority opinion of February 26, 1969, this court did not write a new opinion dealing point by point with the various arguments which had been discussed in the earlier majority and dissenting opinions. Perhaps this economy of words has misled the petitioners. It cannot be fairly asserted, however, that this litigation has suffered at any stage from inadequate debate or want of deliberation. Nonetheless, the new petition asserts that "newly discovered material matter" should be considered, and that new legal arguments are relevant to the proper disposition of the case and should be heard in a third oral argument.

The petition challenges our disposition of this case on three principal grounds: an alleged mistake as to the facts, an alleged misreading of the federal cases which have construed the First Amendment to the United States Constitution,[1] and an alleged misreading of the Oregon Constitution, Art I, §§ 2, 3, 4, 5, and 6.

First, as to the factual record, the petition is not well taken. The petition asserts that the only governmental act in support of the erection of the cross by private parties was the issuance of building and elec-

[1] United States Constitution, Amendment 1:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

trical wiring permits. This assertion overlooks the important fact that the city also turned over to private parties the city-maintained public land in which the cross was imbedded in concrete so that it would last, as one of the defendants testified, "forever." Other charges of factual inaccuracy in the opinion are equally unsupported by the record.

Turning to another argument urged in the petition, the proponents of the display seek to reopen the case for the purpose of introducing evidence that the public park atop Skinner's Butte in Eugene is a "War Memorial Park" and therefore is a fit site for a lighted cross regardless of reasons which might militate against such a display on other types of public lands or buildings. The petitioners' argument seems to be that because the park was dedicated to a secular purpose it must be assumed that a principally secular purpose motivated the city's participation in the display of the cross. This argument was made in the original trial, and all the evidence the petitioners now seek to have reconsidered was in the record which we examined when the case was first before us. The trial court decided that the secular purpose of the park dedication had no relevance to the city council's action then under review. We agree.

The war-memorial argument was never passed upon by the city council. The city's action in this case was taken, and defended during the trial below, primarily as an action taken by the city in response to the political power of the majority of the townspeople. At the trial, the city argued that the city council intended to aid the business community, some of whose members expressed a desire to display the cross in order to enhance the commercial exploitation of the principal Christian holidays: Christmas and Easter.

city's evidence tended to support this theory. At same time, the record shows, a majority of the ple in the community apparently viewed the dis- with approval because it reinforced their religi- preference. These religious views also had been ught to bear upon the city government.

A majority of this court was of the opinion in ober, and remains of the opinion now, that the gedly commercial purposes behind the erection of cross were, like the war-memorial argument, ely afterthoughts which were developed and em- ished in response to this litigation.

The principal purpose which motivated the city ncil was its desire to conform to the desires of a ority of the citizens of the community, who con- ntiously believed that their preferred religious bol was entitled to preferential public display ply because the majority wished it so. Such a onse to majority religious pressure is, of course, tly what specific guarantees of rights in the state federal constitutions were designed to prevent.

f the hilltop in question were private property, petitioners and their supporters would be con- tionally entitled to erect their cross under the exercise clause of the First Amendment. How- , the land is public, and its custodian is a govern- tal subdivision. This is the decisive factor.

Public land cannot be set apart for the permanent lay of an essentially religious symbol when the lay connotes government sponsorship. The em- ment of publicly owned and publicly maintained erty for a highly visible display of the character he cross in this case necessarily permits an in- nce of official endorsement of the general religious fs which underlie that symbol. Accordingly, per-

sons who do not share those beliefs may feel that their own beliefs are stigmatized or officially deemed less worthy than those awarded the appearance of the city's endorsement. While government can foster education in the history and cultural contributions of religions generally, and can act to protect the individual's right to his own personal expressions of religious opinion, the government has no business placing its power, prestige, or property at the disposal of private persons or groups either to aid or oppose any religion. *Epperson v. Arkansas*, 393 US 97, 89 S Ct 266, 21 L Ed 2d 228 (1968); *Abington School Dist. v. Schempp*, 374 US 203, 222-223, 83 S Ct 1560, 10 L Ed 2d 844 (1963); *Engel v. Vitale*, 370 US 421, 82 S Ct 1261, 8 L Ed 2d 601, 86 ALR2d 1285 (1962); *McCollum v. Board of Education*, 333 US 203, 68 S Ct 461, 92 L Ed 649, 2 ALR2d 1338 (1948).

It is, of course, far too late in the evolution of our federal constitution for the petitioners to overlook the protection which the religion clauses of the First Amendment give to nonreligious citizens and to citizens whose religious beliefs differ from those of the majority. *Torcaso v. Watkins*, 367 US 488, 81 S Ct 1680, 6 L Ed 2d 982 (1961). As it was expressed by Mr. Justice Jackson in *Board of Education v. Barnette*, 319 US 624, 642, 63 S Ct 1178, 87 L Ed 1628 (1943):

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or for citizens to confess by word or act their faith therein * * *."

The present situation is easily distinguished from the public cemetery in which private persons are al-

lowed to designate whether small crosses shall be placed over the graves of their relatives. In the case of the public cemetery, the presence of the individual cross is clearly a matter of individual preference. It can be judicially noted that graves of non-Christians are not usually marked with Christian crosses.

Monuments to religiously motivated persons who become famous are also distinguishable from the type of display found in the case at bar. Statutes of noted religious persons are generally recognized as tributes to the individuals rather than to the religions for which they labored. Religion is, after all, a part of history. Consequently, a public monument to a famous American preacher or to a saint recognized by a church would perhaps be permissible, whereas a public monument depicting a biblical character or religious symbol would tend to sponsor the religion rather than to honor a famous person. In the case at bar, a large Latin cross which is lighted primarily during the Christmas season and Easter week is much more a testimonial to a religious faith than to a person. Those who argue that the cross is a mere secular symbol ignore 2,000 years of history.

Religious freedom and majority rule must live side by side. The majority, no matter how pure its intentions, has no right under our system of government to exert its political muscle to gain a preferred place for its testimony to its religious beliefs.

Lastly, the petition asserts that the majority of this court in adopting in substance the views expressed in the dissenting opinion filed on February 26, 1969, has misread the Oregon Constitution. The petition points out, as "newly discovered matter," the obvious fact that the Oregon Constitution contains no specific language duplicating the so-called Establishment

Clause of the First Amendment to the United States Constitution.

The petition cites evidence available in the 1857 records of Oregon's constitutional debates that the Bill of Rights of the Indiana State Constitution was used as a model for the Oregon Bill of Rights. Indiana's constitution contains an establishment, or "creedal preference" clause.[@] Oregon's Bill of Rights does not. For some reason, our draftsmen did not carry the Indiana creedal preference clause into our constitution. This unexplained omission might have constitutional significance if this court had rested its October 1, 1969, opinion in any degree upon the Indiana Constitution. It did not. The court was fully aware of the language of the Oregon Constitution.

In discussing the constitutional principle of separation of church and state, this court was not engaged in word-matching between other constitutions and the Oregon Constitution. While neither a specific "establishment" clause nor a "creedal preference" clause appears in our state constitution, it is obvious that the founders of this state did not intend to permit the state to sponsor any particular religion. When the draftsmen of the Oregon Constitution provided for the free exercise of religion, they also prohibited the use of public funds to support any preferred religious institution. Oregon Constitution, Art I, § 5.[@]

[@] Indiana Constitution, Art I, § 4:

"No preference shall be given, by law, to any creed, religious society, or mode of worship; and no man shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent."

[@] Oregon Constitution, Art I, § 5:

"No money shall be drawn from the Treasury for the benefit of any religeous (sic), or theological institution, nor

(Continued on page 916)

Petitioners argue, however, that the Oregon Constitution, in limiting its expression to a proscription against spending public "money" on religious institutions, by implication approved of turning over public land to them. This mechanistic interpretation of the state constitution is unwarranted. While differences between real and personal property of course have significance in a variety of legal contexts, these differences have no constitutional substance in a religious context.

We are, therefore, content to let stand our statement in the October 1 opinion, which grounded the decision on the merits in this case in part upon state as well as federal constitutional concepts. We did not intend to rely upon language which is not in our constitution. On the other hand, the language that is in the state constitution shows that the founders of this state did not intend to retreat from the federal position on separation of church and state, but rather intended to emphasize in their own words their own commitment to the doctrine of separation.

Every contention made by either side in this case has been fully examined, and a majority of this court remains convinced that the best interests of both government and religion are served by maintaining strict separation between the majority's political power and the majority's desire to foster its preferred religious faith. It is not the emblem of a religious belief which is objectionable under the state and federal constitutions; it is the enlistment of the hand of government

(Continued from page 915)

shall any money be appropriated for the payment of any religeous (sic) services in either house of the Legislative Assembly."

to erect the religious emblem which offends the constitutions.

The petition for rehearing is denied.

DENECKE, J., dissenting.

I dissent upon the same ground as I dissented from the decision made after rehearing. *Lowe v. City of Eugene*, — Or —, 459 P2d 222 (1969).

PERRY, C. J., joins in this dissent.

PROOF OF SERVICE

STATE OF OREGON)
) ss.
County of Lane)

I, JOHN E. JAQUA, an attorney in the office of Jaqua, Wheatley & Gardner, attorneys of record for Appellant, Eugene Sand & Gravel, Inc., depose and say that on the 18th day of March, 1970, I served a copy of the foregoing Jurisdictional Statement on to the Supreme Court of the State of Oregon in compliance with Rule 33 (1) (3) (4) of the Supreme Court of the United States on

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Eugene, Oregon 97401

attorney for Defendants, by placing a true and correct copy thereof, duly certified to be such by me as such attorney, in a sealed envelope, postage fully prepaid and depositing the same in the U. S. Post Office, at Eugene, Lane County, Oregon, on the date stated below. Said attorneys reside or have their offices at said addresses

I certify that I reside and have my office in Eugene, Lane County, Oregon.

Dated: March 18, 1970.

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SUPREME COURT, U. S.

APR 6 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1969

No. 1335

EUGENE SAND & GRAVEL, INC., *Appellant*,
CITY OF EUGENE, of Lane County, Oregon, a municipal Corporation, *et al*, *Defendants*,

v.

RAYMOND N. LOWE, *et al*, *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

SUPPLEMENT TO JURISDICTIONAL STATEMENT

JOHN E. JAQUA
Counsel of Record for Appellant
WILLIAM G. WHEATLEY
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April 3, 1970

No. 1335

BASIS FOR SUBMITTING THIS SUPPLEMENT

Appellant appeals from a decree of the Supreme Court of Oregon entered December 19, 1969. Within 10 days prior to the 90th day, March 9, 1970, Appellant applied to Mr. Justice Douglas for an extension of time, supported by affidavit and substantiating exhibits. It is the understanding of Counsel that a prompt ruling on such motion would enable them to proceed with emergency speed if necessary. No ruling had been made as of the close of business in this Court March 17 or 18, 1970. Counsel, at high overtime printing and office expense, hurriedly prepared and filed by courier air delivery, a Jurisdictional Statement March 19, 1970. Herewith, Counsel submit vital material which because of this situation did not get into the Jurisdictional Statement. This contingencywas noted on page 15 of said Statement. If fitting, desirable or necessary that a nunc pro tunc order be made to cover, such is now reasonably and respectfully requested.

CASES SUSTAINING JURISDICTION

In accordance with Rule 51 1 (b) (iv) of this Court, Counsel submit the following cases as sustaining jurisdiction:

(1) The Missing No-Establishment Issue: *Marbury v. Madison,* 1 Cranch 137, 2 L ed 60; *Thompson v. State of Utah,* 170 US 343; *American Federation of Labor v.*

Watson, 60 F Supp 1010 (D.C.S.D. Fla 1945) *People v. Western Union Tel. Co.*, 198 P 146 (Colo); *Miller et al v. Johnson, et al*, 92 Ky 589, 18 SW 522, 524; *Corporation of Sisters of Mercy v. Lane County*, 123 Or 144, 201 P 694.

(2) The pro tem Justice Issue: *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 677-678, *Saunders v. Shaw*, 244 U.S. 317. On raising at first opportunity on petition for rehearing level. *Sultan Ry. Co. v. Department of Labor*, 277 U.S. 135. On the effect of a Rule of Court contravening a state statute or provision of a constitution. *Moberg v. Baker*, 217 Or 551, 307 P2d 759, 342 P2nd 825, (1959) *State v. Reyes*, 209 Or 595, 601, 303 P2nd 519 (1951), 20 Am Jur 2nd Courts, pp 446-449, Secs 84-86.

(3) The *Specific* Limitation Issue—Article I, Sec 5: *Torcaso v. Watkins*, 367 U.S. 488 (state constitutional provision a "statute"), *Brinkerhoff-Faris Co. v. Hall*, supra, *Saunders v. Shaw*, supra.

ADDITIONAL STATUTES INVOLVED

Oregon State Constitution, Article VII, Amended Section 2a(3); Oregon Revised Statutes 2.055, 1.260 (2), 2.111 (5), 14.210 (1) (b), 1.210, 1.290 (1) are substantially set forth in Appendix "1," infra. Counsel contend that Rule 47(2) of the Supreme Court of Oregon directly violates ORS 14.210(1) (b), construed with the other named statutes, as well as the state constitutional provision, Article I, Sections 10 and 20 of the Oregon State Constitution and is repugnant to the due process, equal protection and privileges and immunities provisos of the 14th Amendment. This is submitted in compliance with Rule 15 1 (b) (v) of this Court.

QUESTIONS PRESENTED - ADDENDUM

Quetion 2 (the pro tem Justice issue), page 3 of Jurisdictional Statement, line 13 "(Rule 47)" should be expanded to read: "(Rule 47, which contravenes a state statute, ORS 14.210 (1) (b), and Article VII, Amended, Section 2a(3) of the Oregon State Constitution)": This is submitted in compliance with Rule 15 1(d) of this Court.

STATEMENT OF THE CASE - ADDENDA

(In accordance with Rule 15 1 (d) of this Court)

(1.) The Missing No-Establishment Issue was raised promptly after discovery in Appellant's first brief to the Supreme Court of Oregon, pp 39-40, 204-205 on December 8, 1967. The matter was not mentioned in the Oregon Court's February 26, 1969, opinion, nor was it mentioned by that Court in its October 1, 1969, opinion. Appellant, on November 28, 1969, both in its petition for rehearing, brief and motion to admit newly relevant material, raised the issue again. No opportunity was afforded for argument either on the petition or motion, nor has the motion been ruled on by that Court to date. See Record 163.

(2.) The pro tem Justice issue was raised April 29, 1969, in Appellant's petition for reconsideration to the Supreme Court of Oregon, five days after the appearance of the Eugene Register Guard news article, dated April

24, 1969 (Appendix "2" infra). This article, apparently on Court-based information, stated that a decision could be "considered" by a Court because a pro tem justice was part of it, thus making a pro tem justice "second class," rather than first rank in the performance of his judicial duties on the Supreme Court. See Oregon State Constitution Article VII, Amended, Sec 2a(3). Appellant timely raised the issue following the October 1, 1969, opinion, at its first opportunity in its petition and brief for rehearing on November 28, 1969, claiming the action of the Supreme Court of Oregon in its October 1, 1969, opinion was repugnant to the 14th Amendment of the Constitution of the United States (due process, equal protection, privileges and immunities).

(3.) Article I, Section 5 of the Oregon State Constitution as a *specific* limitation issue: Objections that this provision was being twisted out of its plain language meaning and hence, not applicable were raised at demurrer, answer and trial stages and included in Assignment of Error I in Appellant's brief in the Supreme Court of Oregon pp 37-39 filed December 8, 1967. The February 26, 1969, opinion of the Court, ruled no violation of Federal or State constitutions. Therefore, the next challenge to Article 1, Section 5, came after the October 1, 1969, opinion. The question was timely raised in Appellant's petition for rehearing and brief of November 28,

1969, and motion of same date to admit newly relevant material—the missing no-Establishment provision. The December 19, 1969, opinion raises new points for the first time which Appellant considers in this Jurisdictional Statement. See Record 25, 45, 59, 65, 79, 106, and 131.

THE QUESTIONS ARE SUBSTANTIAL-ADDENDA

(1) The missing general no-Establishment issue: The omission of this section from the State Constitution through a clerk's error in 1857 renders Article I, Sections 2 and 3 (Exercise sections) fatally defective and repugnant to the First and Fourteenth Amendments under *Everson v. Board of Education.* See *Ludwig v. Western Union,* 216 U.S. 146, 162; *Pullman Co. v. Kansas,* 216 U.S. 56, 58. When the Supreme Court of Oregon bypassed this vital problem in its October 1, 1969, opinion, Counsel on November 28, 1969, applied to the Oregon Court for submission of this issue on a trial de novo (Record 163). A similar motion was filed the same day regarding the War Memorial Park Dedication by Eugene's City Council in 1934, which *also* was discovered after the case was on appeal. The trial court had stricken the "park purposes" issue from the pleadings (Record 47, 59, 65) so such matter was *not* litigated, then turned around on January 5, 1967, and gave its decision *not* on the constitutional personal rights which alone were liti-

gated (Record 14, 100) but on the park purposes issue!

The December 19, 1969, opinion is neither fair nor correct in calling these two matters "afterthoughts." Such a claim alone, avoiding two crucial issues, is an egregious denial of due process. The failure of the Oregon Supreme Court to pass on the missing no-Establishment provision situation should be basis for appeal. *Lawrence v. State Tax Commission,* 286 U.S. 282-283; *Bantam Books Inc. v. Sullivan,* 372 U.S. 58, 61, note 3.

(2) Supreme Court of Oregon Rule 47(2) is repugnant to state statutes, the State Constitution and the Fourteenth Amendment: Appendix "1" infra, spells out the provisions of state statutes and the constitution. ORS 14.210(1)(b) plus Article VII Amended, Section 2a(3) of the Oregon Constitution appear violated by the October 1, 1969, opinion. The administering of justice, in accord with Article I, Sections 10 and 20 of the Oregon State Constitution "openly * * * and completely" and "upon the same terms * * * to all citizens" is not met when the Constitution of the State and its statutes give "full faith and credit" to the participation of a pro tem justice, only to have it taken away by minority manipulation of a Rule of Court. Such strikes hard at Appellant's right to due process, to equal protection of the laws (one rule as to a full bench of permanent justices;

another, as to a bench with a pro tem justice on it). Similar parties, thus, have been given more favorable treatment. *Ellis v. Dixon,* 349 U.S. 458, 460-462 (violation of privileges and immunities).

The Rule of Court, as applied, is invalid by reason of repugnancy to the Fourteenth Amendment. When newspapers openly state that a case turns on a pro tem justice being the deciding factor, and the resulting action is in the teeth of all relevant state statutes, state and federal constitutional provisions, plainly, Appellant has been denied.

(3) The *specific* limitation against use of State Treasury money from the State Treasury for the benefit of sectarian schools and theological seminaries in Article I, Section 5, was designed *to accompany* the missing no-Establishment provision. When applied to limit use of municipal *land* under a revocable permit for a decorative cross monument it is repugnant to the First and Fourteenth Amendments and Article VI of the Constitution of the United States. The rule of use is *broader* with reference to parks and streets than public buildings. *Milwaukee County v. Carter,* 45 NW2d 90, 92 (Wis 1950) See Hammett "The Homogenized Wall" 53 A.BA.J. 929, 936 (1967); *Stead v. President etc of Commons of Kashaskia,* 243 Ill 239, 90 N.E. 645 (1909). Article I, Section 5 is a specific *limitation;* not a *replacement* of a miss-

ing general no-Establishment provision. The December 19, 1969, interpretation of the Supreme Court of Oregon goes squarely into the face of plain meaning and the time-honored doctrine of its own that every section, clause, word of the Contitution is welded into place. *Corporation of Sisters of Mercy v. Lane County,* 123 Or 144, 150, 261 P 694.

Other state constitutions with provisions like Oregon (Appendix "3") uniformly agree that "religious and theological institutions" under the doctrine of contemporaneous construction refer to sectarian schools and theological seminaries. Carey's book, *The Oregon Constitution,* bears this out at every turn. The interpretation reached in the December 19, 1969, opinion is contrary to all historical documents and public records in the archives of the State of Oregon. A court may not read in omissions, nor may it change constitutional defects. 16 CJS, Constitutional Law, pp 745-746, Section 151.

THE STATE ISSUE ON ARTICLE I, SEC. 5 IS NOT SUFFICIENTLY AN INDEPENDENT GROUND

The December 19, 1969, opinion clearly shows a lack of any "independent" state constitutional ground. The decision on Article I, Section 5 is totally and erroneously based as to law and fact. See Appendix to Jurisdictional Statement, pp XXX, par 2 where the Oregon Court ex-

plicitly concedes a lack of an Establishment or credal preference section. There is *no* foundation in words, history or substance on which to base or read in such a missing proviso into Article I, Sec. 5—a *specific* limitation on state treasury funds for sectarian schools. *Dickman had* a basis: $4,000 worth of text books for Catholic schools paid from the state treasury. There is some rational basis there; none here—where the words, on their face, are totally twisted out of plain meaning in derogation of Appellant's Federal rights. A bald claim of "independent" state ground lacks any merit. As in *Cramp v. Board of Public Education,* 368 US 278, 281 the Oregon Court's interpretation of Article I, Sec. 5 impinges on constitutionally protected rights of speech, association and conduct, and Appellant is denied due process of law. The purported state ground stifles and avoids vindication of Federal rights.

Thus, it is unsubstantial, illusory and used as a device to freeze out Appellant and to avoid the claim and adjudication of Federal rights. The Federal rights are not only interwoven, but are *the* issue which the Oregon Court completely evades. *Hartford Life Insurance Co. v. Johnson,* 249 US 490, 493; *Wolfe v. North Carolina,* 364 US 177, 195. This Court should not overlook this pretense to avoid. *Nickel v. Cole,* 256 US 222, 225; *Atlantic Coast Line R.R. Co. v. Mims,* 242 US 532, 535. Appellant

has squarely raised the Federal issues and the state court has avoided and put them aside. See Davis v. *Wechsler*, 263 US 22, 24; *NAACP v. Alabama*, 357 US 449, 455-458, 377 US 288. The decision of the state court does not rest on either a fair or substantial basis. *Lawrence v. State Tax Commissioner*, 286 US 276, 282-283.

CONCLUSION

Wherefore, Appellant respectfully prays that this Court hear the issues presented by this appeal—firmly believing that, in importance, it joins the significant First Amendment religious proviso cases of the last 25 years from *McCollum* and *Everson* through *Schempp* and *Verner*.

Respectfully submitted,

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April 3, 1970

APPENDIX "1"

OREGON PRO TEM JUSTICE PROVISIONS

Article VII, Amended, Section 2a, State Constitution:

"The Legislative Assembly or the people may by law empower the Supreme Court to * **:

(3) Assign judges of courts inferior to the Supreme Court to serve temporarily outside the district for which they were elected.

A judge or member of the bar so appointed or assigned *shall while serving have all the judicial powers and duties of a regularly elected judge of the court to* which he is assigned or appointed." (Emphasis supplied)

STATUTES

ORS 2.055

"Each judge serving as judge pro tempore of the Supreme Court * * * has all the power and duties, during the term of his appointment, of a regularly elected and qualified judge of the Supreme Court. Every decision, order or determination made by the Supreme Court while one or more judge pro tempore are so serving as judges of the court *shall be as binding and effective in every respect as if all the judges participating were regularly elected judges of the court.* (Emphasis supplied)

ORS 14.210(1)(b)

"*A judicial officer shall not act* as such in a court of which he is a member in any of the following cases:

(b) *When he was not present and sitting as a member of the court at the hearing of a matter submitted for its decision;* * * *" (Emphasis supplied)

ORS 1.210

"A judicial officer is a person authorized to act as a judge in a court of justice."

A Supreme Court justice is a "judicial officer." See also ORS 1.260 and 1.290(1) affirming this recognition of a "judge" serving on the Supreme Court.

APPENDIX "2"

PRO TEM JUSTICE ISSUE

Eugene Register-Guard, April 24, 1969

Cross Review Tied To 'Outsider's' Vote

The Skinner Butte Cross case will be reheard by the Oregon Supreme Court because it was the vote of a pro tem justice that decided the case originally, the Register-Guard has learned.

The high court agreed Wednesday to rehear the case, probably in June. The court earlier this year had ruled 4-3 that the cross could remain atop kinner Butte, in a city park at the north edge of downtown Eugene.

Chief Justice William C. Perry, in announcing Wednesday that the court would rehear the case, gave no indication of the reason for the rehearing. But the Register-Guard learned Thursday that the justices were concerned with the "pragmatic" problem of a tie vote among the six regular justices sitting during the first hearing.

Pro Tem Justice Virgil Langtry of Portland cast the deciding vote, and wrote the majority opinion.

Justice Ralph Holman was in Klamath Falls the day the court first heard the cross case. All seven regular justices will be on the bench when the rehearing is held, a court source said Thursday.

The reason the court made no official comment in ordering the rehearing, according to the source, is that "the court wants to be free to examine each of these questions again." Citing one or more reasons would tend to indicate that the court agreed with that point, the source said.

The petition for a rehearing presented by attorneys for the 10 Eugene citizens seeking the cross' removal raised three arguments for a rehearing. In addition to the vote of a pro tem judge, the petition asserted that the Supreme Court erred in not considering a point raised by the Lane County Circuit Court in the case, and that the court's ruling would tend to validate the presence of any religious symbol on any piece of public property, in violation of the First Amendment.

APPENDIX "3"

STATE CONSTITUTIONAL PROVISIONS BEARING ON OREGON'S ARTICLE 1, SECTION 5

Sect = Church or Denomination

Institution = Sectarian Schools or Theological Seminaries

Alabama 1901 Article XIV, Sec 63
Alaska 1959 Article VII, Sec 1
Arizona 1912 Article IX, Sec 10
Colorado 1876 Article IX, Sec 7
Delaware 1897 Article X, Sec 3
Florida 1887 Decl of Rights, Sec 6
Hawaii 1958 Article IX, Sec 1
Idaho 1890 Article IX, Sec 5
Illinois 1870 Article VII, Sec 3
*Indiana 1851 Article I, Sec 5
Kentucky 1891 Bill of Rights, Sec 5
Louisiana 1921 Article XII, Sec 13
*Michigan 1963 Article I, Sec 4
*Minnesota 1857 Article I, Sec 16
Minnesota 1857 Article VIII, Sec 3
Mississippi 1890 Article 8, Sec 208
Missouri 1945 Article IX, Sec 8
Montana 1889 Article XI, Sec 8
Nebraska 1875 Article VII, Sec 11
New York 1895 Article XI, Sec 4
South Dakota 1889 Article VI, Sec 3
*Texas 1876 Article I, Sec 7
*Utah 1896 Article X, Sec 13
Virginia 1902 Article IX, Sec 141
*Wisconsin 1848 Article I, Sec 18
* especially significant wording

APPENDIX "4"

28 CASES SUPPORTING APPELLANT'S POSITION

Federal Cases

Board of Education Central School Dist. No. 1 v. Allen, 392 US 236; *Zorach v. Clauson,* 343 US 306; *Paul v. Dade*

County, 202 So2d 833 (Fla Ct App), cert den Fla Sup Ct 207 So2d 690, cert den 390 US 1041; *Chamberlain v. Dade County Board of Public Instruction*, 143 So2d 21, rev'd other gds 377 US 402, *Lewis v. Allen*, 11 App Div 2nd 447, Aff'd NYS 2d 867, cert den 379 US 923; *Smith v. Denny*, 280 F Supp 651 (D.C. Cal 1968); *Protestants and Other Americans United for Separation of Church and State et al v. O'Brien*, 272 F Supp 712 (USDC 1967) *Sheldon v. Fannin*, 221 F Supp 766, 774 (USDC Ariz 1963)

State Cases

(Monuments, memorials, scenes, symbols, signs, practices)

Capen v. City of Portland, 112 Or 14, 228 P 105 (1924); *State ex rel Singelmann v. Morrison*, 57 So2d 238 (Ct App La 1952); *State ex rel Johnson v. Boyd*, 217 Ind 348, 28 NE2d 256 (1940); *Craig v. Mercy Hospital-Street Memorial*, 45 So2d 809, 817 (Miss 1950); *Sawyer v. City of Norfolk, et al* (Virginia Circuit Court, City of Norfolk, Chancery No. 7252-C, 1962); *Thomas v. Daughters of Utah Pioneers*, 197 P2d 477 (Utah 1948); *Tompkins v. Hodgson*, 2 Hun 146 (NY 1864); *Parsons v. Van Wyck*, 56 App Div 329, 67 NYS 1954 (1900); *Brahan v. City of Meridian*, 111 Miss 30, 71 So 170 (1916); *Vale v. City of San Bernardino*, 109 Cal App 102, 292 P 689 (1930); *Baer v. Kolmorgen*, 181 NYS 2d 230 (Sup Ct, NY 1958); *Lawrence v. Buchmueller*, 243 NYS 2d 87 (Sup Ct NY 1963); *Los Angeles County v. Hollinger*, 19 Cal Rptr 648 (DCA Cal 1962); *Lincoln v. Page*, 241 A2d 799 (NH 1968); *Koerner v. Borck*, 100 So2d 398 (Fla 1958); *Opinion of the Justices*, 228 A2d 161 (NH 1967); *Reichwald v. Catholic Bishop of Chicago*, 258 Ill 44, 101 NE 266 (1913); *Shelley v. Lebanon County*, 10 Lebanon 84 (Pa Comm Pl 1964); *State v. Williamson*, 347 P2d 204 (Okla 1959); *People ex rel New York League for Separation of Church and State v. Lyons*, 173 Misc 821, 21 NYS2d 250 (1940).

PROOF OF SERVICE

STATE OF OREGON)
) ss.
County of Lane)

I, JOHN E. JAQUA, an attorney in the office of Jaqua,Wheatley & Gardner, attorneys of record for Appellant, Eugene Sand & Gravel, Inc., depose and say that on the 3rd day of April, 1970, I served a copy of the foregoing Supplement to the Jurisdictional Statement in compliance with Rule 33 (1) (3) (4) of the Supreme Court of the United States on

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Attorney for Defendants

by placing a true and correct copy thereof, duly certified to be such by me as such attorney, in a sealed envelope, postage fully prepaid and depositing the same in the U. S. Post Office, at Eugene, Lane County, Oregon, on the date stated below. Said attorneys reside or have their offices at said addresses.

I certify that I reside and have my office in Eugene, Lane County, Oregon.

Dated: April 3, 1970

JOHN E. JAQUA
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IN THE

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OCTOBER TERM, 1969

No. 1335

EUGENE SAND & GRAVEL, INC., *Appellant,*

CITY OF EUGENE, of Lane County, Oregon, a municipal Corporation, *et al, Defendants,*

v.

RAYMOND N. LOWE, *et al , Appellees.*

PETITION FOR REHEARING

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

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May 14, 1970

PETITION FOR REHEARING

Appellant herein respectfully moves the Court for an order (1) vacating its dismissal of appeal, entered on April 20, 1970, and (2) granting the appeal or, in the alternative, referring back this cause to the Supreme Court of Oregon for such additional and proper steps as requested in the conclusion of this Petition, infra.

1. IT IS SUBMITTED THAT NO ADEQUATE STATE GROUND EXISTS TO SUSTAIN A CLAIM FOR ESTABLISHMENT.

(a) *The Establishment "evidence"*: The prime evidence relied on by Mr. Justice Goodwin in the December 19, 1969, opinion to sustain the claim of a state Establishment was a private document (Appellees' Ex "C") *not* an official city record (Appellees' Ex "B"). There is *no* mention of *any* religious activity in the ofcial record. The Oregon Court, per Mr. Justice Langtry, ruled no "religious activity" (following *Paul v. Dade County*) in its February 26, 1969, opinion. The private document, which contained statements of a spectrum of speakers from "A" to "Z" at the City Council December 14, 1964, meeting including Appellees' attorney Harrang, who arranged and paid for the document. It was apparently offered as a purported official city document (Supp to Petition for Writ of Certiorari, April 3, 1970, Appendix "W", "V") and was prepared before the trial, and is not a court-tested document (no confrontation,

no cross-examination). This appearing, and because of the heavy strength given to this document by Mr. Justice Goodwin, it is submitted that the "evidence" is improper, passed as "official"; but now shown unofficial (Supp to Petition for Writ of Certiorari, April 3, 1970, Appendix "V") and should be not considered in this matter de novo. *Finchum v. Lyons*, 247 Or 255, 262, 428 P2d 890 (1967); 30 Am Jur 2d Evidence, p 98, Sec 969; pp 102-103, Sec 972; p 138, Sec 1005; 32 CJS Evidence, pp 812-813, Sec 637. Being private, and not published in obedience to law, the material so discovered is hearsay and not within the exceptions to the hearsay rule.

Establishment was ruled on December 19, 1969, to exist on a state level. This Court has before it public record evidence that there is no general no-Establishment provision in the Oregon State Constitution; that it was inadvertently omitted. Article 1, Section 5, a *special* limitation, aimed at sectarian schools, and put in to go along with the missing Article 1, Sec. 4 from Indiana's Constitution, cannot be tortured into a *general* limitation. The general limitation is not there. There is no general no-Establishment provision in the Oregon Constitution and one cannot violate a missing section. If anything, by virtue of *Everson* and the 14th Amendment, there is a *Federal* question. This is what the Appellees have plumped for all along! Federal rights are directly in-

volved and no adequate state ground exists. The Chancellor's conscience still lives in the courts of equity; and this cause is de novo. Mr. Justice Goodwin cannot, in justice, arrogate to himself the role of a Constitutional Convention.

The *general* no-Establishment provision is *still* missing in the proposed constitution the voters will vote on May 26, 1970. Hans Linde, a counsel for Appellees, plus Mr. Justice Goodwin and Mr. Justice O'Connell, are members of the State Constitutional Commission, and the historical discovery was put before the Supreme Court of Oregon while the cause was on appeal December 7, *1967*. The people of Oregon are entitled to this provision, to know of it, and to vote on it May 26, 1970. See Appendix "A". Compare with existing constitution.

(b). *The Establishment claim in opinions*:

The October 1, 1969 and December 19, 1969, state court opinions show lack of adequate state ground.

Close attention of this Court is called to wording in the three opinions of Mr. Justice Goodwin at the state appellate level. His dissent of February 26, 1969, at 451 P2d 124 (which serves as the basis for his later majority opinion of October 1 and December 19, 1969) clearly states in column 2, paragraph 1:

> "Turning to our state constitution, and given the majority's acknowledgment that the cross dis-

> play is that of a religious symbol, there is *further reason* to rebuke the city council."

This quotation follows his discussion of the *Schempp* case. The *Dickman* case quoted at the state level is clearly not authority for the proposition he states. The *Dickman* case came under Article 1, Section 5 of the Oregon State Constitution since $4,000 from the state treasury was expended for books for the benefit of sectarian schools. The "pressure" of which Mr. Justice Goodwin speaks is based on an unofficial city document (Plaintiff's Exhibit "C"). When the Justice used the word "further", he obviously meant "additional" not "independent"; otherwise he would have surely said so.

The October 1, 1969 opinion, 459 P2d 224 (5), again refers to "reasons" (plural) set forth in his February 26, 1969 dissent. Attention is also called to his opinion of December 19, 1969, 463 P2d 364 (6), where he states:

> "We are, therefore, content to let stand our statement in the October 1 opinion, which grounded the decision on the merits in this case *in part* upon state as well as federal constitutional concepts."

This language in logic and wording militates against any type of *independent* state ground, let alone the adequateness of same.

The non-federal ground is not tenable, not broad enough and is not independent of the federal question.

Stern and Gressman, *Supreme Court Practice*, pp 138-142 (4th ed 1969).

Counsel strongly stress that in striking down the revocable city permit under the Oregon State Constitution, Mr. Justice Goodwin acted under what is conceived to be a compulsion of the federal constitution. A careful reading of his opinions in this case shows that this was first, foremost and predominant in his mind. See *Department of Mental Hygiene v. Kirchner*, 380 US 194, 201 and *Jankovich v. Indiana Toll Road Commission*, 379 US 487, 492. In *Jankovich* the Court at p 492 indicated that the federal and state issues were interwoven "because it [the court] felt under compulsion of federal law as enunciated by this court [Supreme Court of the United States] to so hold". It is submitted that a careful study of Mr. Justice Goodwin's three opinions uncontestably show that *Schempp* was foremost in his mind and that the federal concept controlled.

As in *Ward v. Love County*, 253 US 17, 22-23, the Appellant in *Lowe* set up constitutional rights and is entitled to invoke the jurisdiction of this court whether or not such right was given due recognition by the Supreme Court of Oregon. It is within the province of this Court to inquire not only whether the rights were denied in express terms, but whether they were denied in substance and in effect by putting forward non-federal

grounds of decision *without fair or substantial support.* There is no question but that, on the assertion of Appellant's own rights, the Supreme Court of Oregon refused to hear same. Such is not an adequate support for the state judgment. *Postal Tel. Cable Co. v. Newport,* 247 US 464, 475-6. Mr. Justice Goodwin cannot defeat the plain assertion of Appellant's federal rights. See *Davis v. Wechsler,* 263 U.S. 23, 24 and *NAACP v. Alabama,* 357 U.S. 449.

2. THE STATE COURT OCTOBER 1, 1969, OPINION ON THE PRO TEM JUSTICE ISSUE LACKS ADEQUACY IN BEING (a) BASED ON A MATERIAL ERROR OF LAW AND (b) THE RULE OF COURT IS CONTRARY TO STATE STATUTE.

Mr. Justice Goodwin committed a material error of law in his October 1, 1969 opinion when under the guise of the "California rule" he indicated that California, Oklahoma and Illinois all supported his position, quoting cases from said jurisdictions. See Appendix "B" for letters from the respective clerks of court of these three jurisdictions explaining that the rule in that jurisdiction is not what Mr. Justice Goodwin generally concludes it to be. The Justice therefore has attempted to hoist himself on his own petard in setting up some kind of authority to justify his position. His position is not only untenable on the law of the jurisdictions which he quotes but it is entirely contrary to Oregon Revised Statutes 14.210 (1) (b) which reads:

> "A judicial officer shall not act as such in a court of which he is a member if any of the following cases: * * *
>
> (b) When he was not present and sitting as a member of the court at the hearing of a matter submitted for its decision; * * * "

Under the statutes of the State of Oregon, a Supreme Court Justice is clearly a "judicial officer." See Supplement to Jurisdictional Statement, Appendix "1" for a clear detailing of these. It is fundamental law that a rule of court which conflicts with a statute must bow to it.

It is serious enough that Appellant should be deprived of due process on a massive scale at the trial level. Deprivation of due process at the appellate level makes a *tandem* deprivation which calls for reversal.

3. THE PRESENT NATIONAL UNCERTAINTY CREATED BY LOWE ARGUES STRONGLY FOR HEARING OF THIS CAUSE BY THIS COURT.

Similar litigation is before the Oklahoma Supreme Court (*Meyer v. Oklahoma City*). Litigation is shaping in Pittsburgh. The television program "Bonanza", Sundays at 9 p.m. shows the lighting of a fuse that soon envelops the whole picture. Should we, as in the prayer and Bible litigation, wait a half century for review? This Court indicates it will move in "Establishment" matters when necessary (See *Walz*, 338 LW 4351). The time is necessitous in *Lowe*. Prayers and catechisms can be

read off school property and no monetary damage is done. But each monument, rich in history, beyond price in tradition and heritage, when once destroyed, can never be replaced, like the "bold peasantry" in Gray's "Elegy". Here then is the "item priceless"—the perfect place for equity to exercise its jurisdiction, according to the well-remembered test of Zechariah Chafee, Jr. Shall we wait for the bulldozers to do their work and then cry "stop"? It will be too late. The occasion is extraordinary. *All* appeal factors, including the importance of the missing no-Establishment provision to the people of Oregon, militate for review.

Then, too, a review of this case can set at rest the assaults on varied traditions implicit in our polity—plaques, memorabilia, right of way signs, chapels, mottos, carrilons, etc. None will be immune from attack if *Lowe* stands—for *Lowe*, though it stands alone, is fraught with danger that can sweep like a conflagration. The fuse has been lit. It should be extinguished; and review only by this Court can do that. Bibles in our courts and crucifixes in courts of Europe are used as reminders to tell the truth (secular). Sunday has come to have a day of rest secular content (*McGowan v. Maryland*). The use, the time, the place, the evidence should tell *something* about symbols. The vice of *Lowe* is an assumption that all crosses, of which there are 374 or more forms, are "Establishments" and Christ in concrete. No case should be one in which Establishment is assumed. A review of

Lowe will settle and discourage the capitous complaints that have been flooding our courts since *Everson*. Postage stamp "Madonnas" and reflections of our culture and traditions deserve a better fate than constant attack by a few who would tear down all and give us a sterile absolute secularism only in return. In the words of the late and great Learned Hand:

> "The First Amendment * * * gives no one the right to insist that * * * other conform to his own * * * ."

It is time again to begin accentuating the positive in our sectional and national living.

CONCLUSION

It is respectfully requested that this Court reconsider and hear this cause on appeal. If this request is denied, then, in the strong interests of justice and in the collective welfare of the people of Oregon it is requested that this Court:

(1) vacate and remand to the Supreme Court of the State of Oregon for further consideration in the light of the missing no-Establishment provision and the lack of in the proposed constitution so that the matter may be treated immediately by that Court prior to the May 26, 1970 election involving the fundamental liberties of the people, or (2) continue this cause in this Court to enable counsel for Appellant to apply to the state court for amendment or revision of its decision or request a cer-

tificate from the Supreme Court of Oregon showing whether that Court intended to rest its judgment on an adequate and independent state ground or whether the decision of the federal question was necessary to the judgment rendered; (3) vacate and remand to the Supreme Court of the State of Oregon with instructions to appoint a master or referee under ORS 17.705-17.765 to hear the War Memorial issue, the missing "no Establishment" provision issue, and properly evaluate and consider Appellees' trial Exhibit "C" and to render Appellant due process of law in other respects.

The Court's special attention to Appendix "E" is called. The opinion arrived in time for comment in the Appendix.

Respectfully submitted,

JOHN E. JAQUA
Counsel of Record for Petitioner

WILLIAM G. WHEATLEY
JACK A. GARDNER
WARREN CAMERON
Of Counsel for Petitioner

825 East Park
Eugene Oregon 97401

May 14, 1970

APPENDIX "A"
BILL OF RIGHTS IN PROPOSED CONSTITUTION TO BE VOTED ON MAY 26, 1970, BY OREGON VOTERS SHOWING MISSING NO-ESTABLISHMENT PROVISION STILL MISSING.

ARTICLE I

BILL OF RIGHTS

Section 1. The rights enumerated in this Constitution are independent of and supplementary to those guaranteed under the Constitution of the United States. The people at all times have a right to alter, reform or abolish the government in the manner they may think proper.

Section 2. The right of free expression of opinion and to speak, write or print freely on any subject shall not be restrained, but every person shall be held responsible under law for injury done by abuse of that right.

Section 3. The right of the people peacefully to assemble and to petition the government shall not be abridged.

Section 4. Every person shall be secure in the right to worship God according to the dictates of his own conscience. A law shall not restrain the free exercise and enjoyment of religious opinions or interfere with the rights of conscience.

Section 5. Public money shall not be appropriated or spent for the benefit of a religious institution or for the payment of a religious service in either house of the Legislative Assembly.

Section 6. A religious test shall not be required as a qualification for a public office or employment, nor shall a witness or juror be questioned about his opinions on matters of religion. Oaths or affirmations administered to a person shall be in the mode most consistent with and binding on his conscience.

Section 7. The right of the people to be secure in their persons, houses and other property, papers and effects, against unreasonable searches and seizures shall not be violated; and a warrant shall not issue but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized. A person shall not be compelled to give testimony that might tend to incrimina e him.

Section 8. In a prosecution for a crime or offense punishable by loss of liberty:

(1) The accused has the right to a timely and public trial in the county in which the crime or offense is committed.

(2) The accused has the right to be tried by an impartial jury, except when he elects to be tried by the judge of the court alone or when he is charged with contempt of court.

(3) The accused has the right to know the nature and cause of the accusation against him and to have a copy thereof, to be heard in his own behalf, to meet witnesses face to face and to have compulsory process for obtaining witnesses.

(4) A jury shall determine the facts under the direction of the court as to the law. Verdicts by five-sixths of a jury may be authorized by law, but a verdict of guilty of a capital crime or offense must be unanimous.

Section 9. Every person has the right to assistance of counsel in all official proceedings and dealings with public officers. If he cannot afford counsel, he has the right to have counsel appointed for him in any case in which he may lose his liberty.

Section 10. A court shall not be secret, and justice shall be administered openly and without purchase or delay. A person shall not be deprived of any right, privilege or liberty by any unlawful or unfair procedure, or be denied remedy in due course of law for injury done him in his person, property or reputation.

Section 11. Every person, before judgment of conviction, is entitled to bail by sufficient surety, but excessive bail shall not be required. Bail may be denied to a person charged with a crime or offense punishable capitally or by life imprisonment, giving due weight to the evidence and to the nature and circumstances of the event. In the discretion of the court, bail may be allowed after judgment of conviction. A person arrested or confined shall not be treated with unnecessary rigor.

Section 12. Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice. Excessive fines or cruel and unusual punishments shall not be imposed. Punishment shall not be disproportionate to the nature of the offense. A conviction shall not cause corruption of blood or forfeiture of estate.

Section 13. A person shall not be subjected unnecessarily to several prosecutions for the same conduct, or be put in jeopardy twice for the same offense.

Section 14. Imprisonment for debt shall not be imposed, except in case of fraud or absconding debtors.

Section 15. The privilege of the writ of habeas corpus shall not be suspended. The operation of the laws shall not be suspended, except by authority of the Legislative Assembly.

Section 16. Treason against the state consists only in levying war against it or in adhering and giving aid or comfort to its enemies, and shall not otherwise be defined under another name. A person shall not be convicted of treason except on the testimony of two witnesses to the same overt act or on confession in open court.

Section 17. The people have the right to bear arms for the defense of themselves and the state.

Section 18. The military shall be subordinate to the civil power. In time of peace a member of the armed forces shall not be quartered in a house without the consent of the owner or occupant, or in time of war except as provided by law.

Section 19. Private property shall not be taken or damaged for public use, or the particular services of a person be demanded, without just compensation; or, except as provided by law, without just compensation first assessed and tendered.

Section 20. A law shall not grant to any person or class of persons privileges or immunities that, on the same terms, do not belong equally to all persons.

Section 21. An ex post facto law or law impairing the obligations of contracts shall not be enacted.

Section 22. The taking effect of a law shall not be made to depend on any authority except as provided in this Constitution.

APPENDIX "B"
"PRO TEM JUDGE ISSUE"—50-STATE SURVEY

G. E. BISHEL, CHIEF DEPUTY

DEPUTIES
JOSEPH M. ROGERS
KEITH M. HAWKES
REMO C. MATTEOLI
MARK F. THOMPSON
SAN FRANCISCO

DAVID BLOMGREN
ROBERT F. JOHNSON
LOS ANGELES

A. F. BRADOVICH
SACRAMENTO

OFFICES
SAN FRANCISCO 94102
4250 STATE BUILDING

LOS ANGELES 90012
1008 STATE BUILDING

SACRAMENTO 95814
108 LIBRARY AND COURTS BUILDING

OFFICE OF THE CLERK

Supreme Court of California

WILLIAM I. SULLIVAN, CLERK

San Francisco, California
December 8, 1969

RECEIVED
DEC 9 1969
JAQUA, WHEATLEY & GARDNER
ATTORNEYS AT LAW

William J. Wheatley, Esq.
825 East Park
Eugene, Oregon 97401

Dear Sir:

This is in response to your letter of December 2. Prefatory to any discussion of your inquiry we must refer to our form of assignment of appellate justices. Any justice of the intermediate appellate Court of Appeal who is assigned to the Supreme Court is assigned for a definite period (i.e., from a designated starting date to a designated later date "and until he has completed and disposed of all causes and matters submitted to him").

The necessity for assigning a pro tempore justice may arise from either of two situations:

1. Absence of a regular justice of the court, or

2. Disqualification of a regular justice of the court.

Under our practice, if the pro tem. justice is assigned and participates in the disposition of a case because of the absence of a regular justice, and the regular justice returns or is available to act on any petition for rehearing, or is available after a rehearing has been granted, the regular justice (and not the pro tem. justice) acts on the petition for rehearing or on the subsequent disposition of the case after the rehearing had been granted.

On the other hand, under our practice, if the pro tem. justice is assigned and participates in the disposition of a case because of the disqualification of a regular justice, the pro tem. justice acts on the petition for rehearing and on the subsequent determination of the case after rehearing is granted even though these events may occur after the expiration of the definite period designated in the assignment, and this is so because of the language first quoted above, i.e., "and until he has completed and disposed of all causes and matters submitted to him."

William J. Wheatley, Esq.
Page Two December 8, 1969

It is suggested that you read the decision of our Supreme Court in L.A. 17511 - The Metropolitan Water District of Southern California v. Adams and Holmes, reported in 19 Cal.2d at page 463, 122 P.2d 257.

The decision in that case is discussed in 3 Witkin, California Procedure at page 2409. A copy of that discussion is enclosed.

It is hoped the foregoing will be of assistance to you.

Very truly yours,

William I. Sullivan

WILLIAM I. SULLIVAN,
Clerk of the Supreme Court

WIS:ct

Enclosure

V

STATE OF ILLINOIS

OFFICE OF

CLERK OF THE SUPREME COURT

SPRINGFIELD

62706

JUSTIN TAFT
CLERK

December 15, 1969

TELEPHONE
AREA CODE 217
525-3033

RECEIVED
DEC 18 1969
JAQUA, WHEATLEY & GARDNER
ATTORNEYS AT LAW

Mr. William G. Wheatley
Attorney at Law
Jaqua, Wheatley & Gardner
625 East Park
Eugene, Oregon 97401

Dear Mr. Wheatley:

The question posed in your letter is interesting and novel but without answer in Illinois. Neither the Illinois Constitution, Statutes nor Rules of this Court provide for the situation outlined in your letter.

The practice in Illinois does not permit the appointment of a pro tem Justice either by the Governor or by this Court, although under our present Constitution, retired judges may be recalled, with their consent, to serve. At the present time, there are three Justices on the Supreme Court who had retired as either circuit or appellate court judges. Two former Justices who recently resigned are living but have not taken part in any action on rehearings before the Court even though they voted on the opinion to which the rehearing petition is directed.

In Illinois there is no oral argument when a rehearing is granted but the case is resubmitted solely on the original briefs, petition for rehearing, answer and reply.

From the foregoing, if we were compelled to give an answer, we would respond to your question in the negative.

Very truly yours,

Clerk of the Supreme Court

JT:hw

SUPREME COURT OF OKLAHOMA
OFFICE OF THE ADMINISTRATIVE DIRECTOR OF THE COURTS
OKLAHOMA CITY, OKLAHOMA 73105

MARIAN P. OPALA
Administrative Director
of the Courts

305 State Capitol
AC 405 521-3842

December 9, 1969

RECEIVED
DEC 15 1969
JAQUA, WHEATLEY & GARDNER
ATTORNEYS AT LAW

William G. Wheatley, Esq.
Messrs. Jaqua, Wheatley &
Gardner
Lawyers
825 East Park
Eugene, Oregon 97401

Dear Mr. Wheatley:

Your inquiry of December 2, 1969 has been referred to me for reply.

The matter you inquire of is settled neither by statutory or constitutional provision nor by rule of court or decisional pronouncement. The tradition in Oklahoma has it that the pro tem justice who participates in the consideration of a case continues to serve until its final disposition by the Supreme Court unless prevented from so doing by death or a physical disability.

I trust this answers the question you posed.

Sincerely,

Marian P. Opala

MPO:bl

APPENDIX "C"
CROSS AND ESTABLISHMENT COMMENT OF MR. JUSTICE DOUGLAS
Eugene Register Guard, February 24, 1965, Page 1A

Supreme Court's Rule Described by Douglas

By SAM FREAR of the Register Guard

"Justice William O. Douglas of the U.S. Supreme Court spent six hours in Eugene Tuesday, and the outspoken 66-year-old jurist commented on China, Viet Nam, the United Nations, the Oregon Dunes, Eugene's cross and a host of other subjects. * * *

"In a press conference before his talk, Douglas ranged over a wide spectrum of questions.

"He did not appear too concerned about Eugene's controversy over placing a cross on public property, Eugene's Skinner Butte Park. Supreme Court cases on the separation of church and state have been worried about 'quite a different problem,' he explained.

" 'Our idea is to keep the state out of the business of establishing religion,' Douglas said, 'and establishment means putting the state behind the rites, ritual or dogma of any one religion.' " * * *

APPENDIX "D"
INFORMAL OPIONION OF ATTORNEY GENERAL OF STATE OF OREGON.

November 13, 1969

MEMORANDUM
To: Dr. R. E. Lieuallen
From: Ray Underwood
Subject: University of Oregon Medical School's Lighted Cross on Side of Doernbecher Memorial Hospital During Christmas Season

The American Civil Liberties Union of Oregon, through its chairman, Mr. Charles Davis, has asked the position of your office regarding the above described display.

The Oregon Supreme Court has recently held that the erection of an illuminated cross on city property was unconstitutional as a religious display. *Lowe v. City of Eugene,* 89 Or. Adv. Sh. 323 (1969), withdrawing the majority opinion in its first consideration of the case in 87 Or. Adv. Sh. 1059 (1969). The opinion affirmed the decree of the trial court for the reasons set forth in the dissenting opinion of the Oregon Supreme Court in its first consideration of the case. A copy of that opinion is attached.

The facts in the Medical School display are essentially similar to the facts of the *Lowe case.* Therefore, it is my opinion that the Medical School display is unconstitutional also.

It is my understanding that an attempt is being made to obtain a ruling by the United States Supreme Court in the *Lowe* case. However, I doubt that the latest ruling by the Oregon Supreme Court will be modified by the United States Supreme Court. In any event, until such a modification is made, the *Lowe* ruling is the controlling law.

RPU:ej

APPENDIX "E"

NO "ESTABLISHMENT" EXISTS UNDER WALZ v. TAX COMMISSION OF THE CITY OF NEW YORK, 38 LW 4347

Any power overload in one church feared by Madison or Jefferson in 1802 was dispersed into a multiplicity of religious sects. The monolithic single ruler of Europe, omnipresent in the Danbury letter, proved not the American way—many religious organizations in a Federalistic government of the people (9th and 10th Amendments). But the image of a solid "wall" persisted into American history, nursed by *Reynolds v. United States,* 98 U.S. 145 until softened by the "wholesome neutrality" of *Schempp,* and now the "benevolent neutrality" of *Walz.* How much more suited to activist religious sects (recognized as equals with other political and social groups as working forces in society), espousing common values and goals, would be Madison's "line of separation" promulgated in 1832 in a letter to the Reverend Jasper Adams in which he wrote that he had to:

> "admit * * * that it may not be easy in every possible case, to trace the line of separation between the rights of religion and Civil authority with such distinctness as to avoid collisions & doubts on unessential points. The tendency to a usurption on one side or the other, or to a corrupting coalition or alliance between them, will be best guarded against by an entire abstinance of the Government from interference in any way whatever, beyond the necessity of preserving public order, & protecting each sect against trespasses on its legal rights by others." *

The Madisonian "line" finds expression in the "channel" of Mr. Justice Harlan in *Sherbert,* 374 U.S. 398, 422, the "boundaries" and "not * * * an absolutely straight line"; of Mr. Chief Justice Burger in *Walz,* 38LW at 4348. The "serpentine wall" once envisioned by Mr. Jus-

*See also statements of Mr. Chief Justice Hughes and Mr. Justice Holmes in Westin, *The Supreme Court: Views from Inside,* p 43 (W. W. Norton & Co., N. Y. 1961).

tice Jackson may be today's somewhat meandering line.

The "sponsorship, financial support and active involvement" making up "Establishment" for the Founding Fathers and noted in *Walz*, 38 LW 4348 is lacking in *Lowe*. There is no showing that this cross has been used here *exclusively* as a religious symbol; and it has been shown that the purpose has been secular over the 34 years Chamber of Commerce spair (as in *Paul*)—namely a beacon, symbol of goodwill and foremost—decoration, which is not indoctrination. Mr. Justice Goodwin assumes "Establishment" in a cross ab initio, and equates it with a "silent witness to faith." Things become holy by association with things holy, wrote Tillich. This should be good law here.

Mr. Justice Douglas, in comments to the Eugene newspaper (see Appendix "C") high-pointed the absence of organized religion and worship, rites, ritual. The record is barren of *any* religious ties in, or connection with any organized religious body (*Davis v. Beeson*, 133 U.S. 333; see also *Terrett v. Taylor*, 9 Cranch 41, 48). City Manager McKinley testified that the park was open to all (Tr 796-812) thus no *favoring* of sect. Neither a religious body erected the cross, nor does it maintain it. Parks are for a divergence of culture and attitudes. Is San Francisco's Statue of Buddha an "Establishment"? Its totem pole? Its Father Serra with cross? Its Prayer Book Cross? Rather, they give, with the Young Museum, a wonderful diversity of culture and community heritage.

Heritage should mean something. 200 years of church tax exemptions will withstand challenge, according to the twice-used quotation of Mr. Justice Holmes in *Walz*, as well as in *Lincoln v. Page*, 241 A2d 799 (NH 1968). Monuments and memorials have been part of Mr. Justice Brennan's "civil polity" from the earliest towns and cities, predating Christianity. See 1 McQuillin, *Municipal Corporations*, 90, Secs 1.32-1.35. Therefore, should not more than 2,000 years of the custom of monuments, including crosses used as palladia of civil liberties in Europe, the market crosses of England, and the land-

marks and cemetery usage in the United States, call for something beyond the informal record of hearsay (Appellees' Exhibit "C"), Mr. Justice Goodwin relied on to hoist, *deus ex machina*, an assumed "Establishment?" The primary purpose and effect of this monument, in the building permit, testimony of the erector, Mr. Alltucker, and the history of the crosses in the Chamber of Commerce records, is overwhelmingly secular and the Oregon Court so found in its February 26, 1969 opinion. See *Walz* 38 LW 4349 citing *Sherbert*, 374 U.S. at 423.

Tradition should mean much. In *Walz* 35 LW 4352, Mr. Justice Brennan states:

> "The more longstanding and widely accepted a practice the greater its impact upon constitutional interpretation."

Monuments, as well as church tax exemptions, should be "accepted as a matter of course", in the words of Mr. Justice Harlan in *Walz*, 382 LW at 4357. Professor Freund, with acuity points out, in *Time*, December 11, 1964, p 59:

> "It is hard to see how such things can be challenged in law so long as they are not addressed to a captive audience and do not call for a profession of commitment or rejection on the part of those who witness them."

There is no intellible "nexus" between a monument and "Establishment", either in *Paul v. Dade County* or in *Lowe*—yet opposite results have been reached to the confusion of the country. Religion is surely not present in the sense of "organized religion" spelled out so well in *Davis v. Beeson*, or in Madison's "line". There is no continuing involvement, nor excessive involvement. See *Walz*, 38 LW 4350. The city's role has been minimal. It merely granted a revocable permit on public property. The City Council was arrogated to do this in practice. The City Engineer's office handles the private permits. There is *no* financing, no taxing. Mr. Alltucker had paid for the electricity from the beginning. *All* the indicia of "Establishment" are absent according to *Walz*. Here is not the championing of organized religion *per se* and *qua* religion.

Prepared by Warren Cameron

PROOF OF SERVICE

STATE OF OREGON)
) ss.
County of Lane)

I, JOHN E. JAQUA, an attorney in the office of Jaqua, Wheatley & Gardner, attorneys of record for Appellant, Eugene Sand & Gravel, Inc., depose and say that on the 14th day of May, 1970, I served a copy of the foregoing Petition for Rehearing on Appeal in compliance with Rule 33 (1) (3) (4) of the Supreme Court of the United States on

Hans A. Linde
Attorney at Law
1858 University Street
Eugene, Oregon 97401
(residence)
James J. Harrang
Attorneys at Law
631 Pearl Street
Eugene, Oregon 97401
Attorneys for Appellees

Herman P. Hendershott
City Attorney
City Hall
Eugene, Oregon 97401
Attorney for Defendants

bi placing a true and correct copy thereof, duly certified to be such by me as such attorney, in a sealed envelope, postage fully prepaid and depositing the same in the U. S. Post Office, at Eugene, Lane County, Oregon, on the date stated below. Said attorneys reside or have their offices at said addresses.

I certify that I reside and have my office in Eugene, Lane County, Oregon.

Dated: May 14, 1970

JOHN E. JAQUA
Counsel of Record for Appellant
825 East Park
Eugene, Oregon 97401